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THE
TRADER'S SAFEGUARD:

OR,

A FULL, CLEAR, AND FAMILIAR

EXPLANATION OF THE LAW

CONCERNING

Bills of Exchange, Promissory Notes,

AND

EVIDENCE ON A TRIAL BY JURY.

TO WHICH IS ADDED,

A Description of the Mode of Commencing and
Proceeding in PERSONAL ACTIONS.

THE SECOND EDITION.

With a Copious ALPHABETICAL INDEX, and other very large
ADDITIONS and IMPROVEMENTS.

By PETER LOVELASS,

OF THE INNER TEMPLE, CONVEYANCER;

Author of "The Law's Disposal."

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P R E F A C E.

THE millions of property daily circulating in bills of exchange and promissory notes, wherewith every man in any way of business or calling must, in some degree, inevitably be concerned; as hereon the support and exercise of trade and commerce, both at home and abroad, is continually depending: and the numerous suits commenced and prosecuted in the courts of law even within those last twenty years, for determining the properties, nature, and effects, of paper credit, are indisputably loud calls for a work of this kind. And, as a deficiency in the knowledge of this branch of jurisprudence has proved not only injurious, but fatal to many, the utmost care is here taken to elucidate the law relative hereto, and render the same clear and comprehensive.

AND with a due sense of the important subjects contained in those sheets, great care has been taken in thoroughly digesting, and properly authenticating the same, with references to the best and most recent authorities; the like precaution being here taken

which the author took in compiling his work, entitled, "The Law's Disposal," particularly the seventh edition, wherein he endeavoured to lay down the law with more clearness and perspicuity than in his former editions, and to render the same perfectly comprehensible to persons who might have but little or no previous knowledge of law books; and similar to his proceeding therewith, and shewing in a plain, clear, and familiar manner, who would be entitled to an intestate's estate and effects, by the laws of England, and some prevalent customs; and the sure and safe methods to be pursued by testators in forming, and executors performing their wills; with a variety of forms for enabling every man accurately to make and alter his own will; and plain directions for executors proving and executing the same with the utmost safety to their own estates; and for both their and administrators proceeding to obtain probate of a will or administration from the prerogative court, when residing at any or the most distant part of the nation.

HERE he has proceeded on the law relative to bills of exchange and promissory notes, tracing it from its origin, and progressively explaining the same, with a view to furnish the reader with a perfect knowledge thereof, and the custom of merchants concerning those bills and notes; and thereby to enable persons concerned either in drawing, accepting, indorsing, negotiating, discounting, or taking the same in payment, to act with the utmost propriety and safety to their credit and property.

P R E F A C E

TO THE

S E C O N D E D I T I O N .

THE numerous momentous points in litigation concerning bills of exchange and promissory notes, since the first impression of this work was published, rendering a full and accurate account of the law concerning them wholly impracticable, occasioned a delay till now of this edition, notwithstanding the loud call for the same; and consequently obstructed the executing our design of furnishing gentlemen of the profession, merchants, bankers, and traders in general, with such a full and perfect detail of the law relative to those bills and notes, and divers other commercial concerns, as is here attempted, by numberless additions to, and improvements on the first impression, as well with respect to those bills and notes, as to evidence on a trial by jury, and other important points pertaining to trade and commerce; with a view to give the reader a full information of the law as it now stands in all its particulars concerning those negotia-

ble instruments, and likewise to guard commercial men in their general and most usual course of trade and dealings; as in making contracts and vending goods, against losses and misfortunes which too frequently happen through ignorance of the law as to those particulars, and of what is requisite for securing debts and obtaining the same when sued for; and also to guard them with respect to partnerships, in which many through a deficiency of knowledge of what constitutes a partnership, have unwarily been involved to their utter ruin; as thereby rendering themselves liable to debts contracted: to obviate which we have here, after attending to the acts of one partner binding the others, shewn how a man may be constituted a partner by lending money to a trader; by joining in buying and selling particular goods, and how partners may be sued^a.

AND, as well for rendering the subjects perfectly intelligible to those unacquainted with the system of our law, and the technical terms and phrases used therein; as also for furnishing the reader with a general view of the proceedings in an action at law; we have briefly described the mode of commencing and proceeding in personal actions, from commencement of the suit, to judgment and execution thereof; whereby the import of a great variety of the law terms and phrases here used is fully demonstrated^b; and a definition of various others are frequently given as they have occurred; and for defining others, notes are added at the bottom of different pages. And

See page 120 to 124.

^b Page 250 to 257.

that,

that those terms and phrases which would not admit a definition immediately as they occurred, may be readily discovered, the same are ranged in the alphabetical index, whereto recourse being had their import will easily be found.

WITH the divers other additions and improvements here made relative to the law concerning bills and notes, is described various frauds and forgeries that have been practised therewith, and the punishments for the same; and enlargements made, on shewing how an innocent holder may recover on a stolen or forged bill^c; and how bills and notes may with safety be discounted, or taken in the course of trade, and interest immediately calculated, by tables here laid down^d. The mode of proceeding against the different parties thereto by action at law, with forms of declarations, and directions for stating the plaintiff's complaint therein^e. What proof is requisite in an action against the different parties to a bill or note; and what defence defendant may set up to the action^f. The satisfaction that may be had by suing on a bill or note^g. By proving same under a commission of bankruptcy; circumstances under which a bill or note will or will not be admitted to be proved; how holder may prove where the bill or note is unexceptionable, and how where received a part before or after having proved; what interest is allowed under a commission, and what

^c Page, 156 to 177.

^d Page 178.

^e Page, 198 to 213.

^f Page, 214 to 224.

^g Page, 227 to 233.

costs and charges accrued or incurred by a bill or note may be proved^b.

FROM what is premised, it may be observed, that this edition contains near double the quantity of the first impression; and as in the preface to the seventh edition of the author's work, entitled "The Law's Disposal" (heretofore attended to in the former preface) it was mentioned that he had there made digressions, by frequently attending to divers momentous points, more immediately relating to the business of a conveyancer, than ever was attended to in any other work wrote on wills and testaments; so here in treating on the law as it pertains to bills of exchange, promissory notes, and evidence, he has made frequent digressions from the particular subjects, and pointed out a variety of circumstances for guarding commercial men, in their general and most usual course of trade and dealings; and hereon as well as on the business of conveyancing, hath lately raised a superstructure, and enlarged on what is touched upon here and in the "Law's Disposal;" by a treatise entitled "THE TRADER'S and CONVEYANCER'S GUIDE and GUARD," which will be published as expeditious as possible.

CITY ROAD, MOORFIELDS,

Feb. 1793.

^b Page, 237 to 245.

TO THE READER.

FOR preventing repetition in the following sheets, references are occasionally made to the chapters, sections, and paragraphs; and for a ready discovery, the chapters and sections are inserted at the top of every page. For a general view and discovery of the different subjects, the contents are enlarged upon at the beginning of each chapter; and for a discovery of particulars, recourse may be had to the alphabetical index.

TO THE READER

I have been very anxious to see the following
volume of the "Journal of the American
Medical Association" and in a ready answer
the chapter on "The History of the
American Medical Association" and a history of
the American Medical Association and the
at the present time of the American
of medicine and surgery and the history of

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ERRATA.

Page 46. line 9. for § IX. read § XI.

62. line 7. for par. 3. read par. 2.

line 11. from the bottom, for par. 4. read par. 3.

68. line 7. from the bottom, for par. 5. read par. 4.

202. line 2. for J. read R.

The Trader's Safeguard;

OR,

A FAMILIAR EXPLANATION OF THE LAW CONCERNING BILLS OF EXCHANGE, &c.

CHAP. I.

Of the Origin and Properties of Bills of Exchange and Promissory Notes. The Stamps whereon they are to be written or printed. Letters containing Agreements being exempt from Stamp Duty.

IN the first section of this chapter we shall give the reader a brief description of the origin and properties of bills of exchange and promissory notes. In § II. a conspicuous view of the stamps whereon those and receipts are required to be written or printed, with a copious abstract of the statute 31 Geo. III. c. 25. requiring the same. In § III. a copy of statute 23 Geo. III. c. 51. by which certain letters, containing agreements, are exempt from stamp duty.

§ I. **BILLS** of Exchange are of great antiquity, and are established by the custom of merchants, which is part of the law of this realm^a. Till very lately those bills were written or printed on unstamped paper, but now are required, under certain penalties, to be on such stamps as the legislature has appointed, as will be seen in the following section. The form of the bill is like that of an open letter of request, written on a piece of paper, commonly long and narrow, from one man to another, desiring him to pay a sum of money named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. This method is of great antiquity, the invention whereof being when the Jews were banished out of Guienne in 1287, and out of England in 1290; when the more ea-

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filz

^a Law's Disposal, 130.

sily to draw their effects out of France and England into those countries, in which they had chosen to reside, they pursued this method, which soon after became of general use. In common speech, such a bill is frequently called a *draught*, but a *bill of exchange* is the more legal as well as mercantile expression. The person who writes it is called, in law, the *drawer*, and he, to whom it is written, the *drawee*; and the third person, or negotiator, to whom it is payable (whether specially named, or the bearer, generally) is called the *payee*.

THOSE bills are either *foreign* or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England or, *vice versa*; and *inland*, when both the drawer and drawee reside within the kingdom. Formerly foreign bills of exchange were more regarded in the eye of the law than inland ones; but now, by statutes 9 & 10 W. III. c. 17. and 3 & 4 Anne, c. 9. inland bills of exchange are put upon the same footing as foreign ones, what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being, by those statutes, expressly enacted with regard to the other^b. However, in some respects, a difference between them subsists, as will be seen hereafter in C. III. § II. par. I.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum of money specified at a time therein limited to a person therein named, or to his order, or to the bearer at large, and are made negotiable by statute 3 & 4 Anne, c. 9. concerning which, particular mention will be made in our two ensuing chapters. Those notes, as well as bills of exchange, are, as before hinted, to be on paper, vellum, or parchment, stamped with such stamps as the legislature hath lately required, as is demonstrated in the following section.

§ II. BY STATUTE 31 Geo. III. c. 25. is repealed the statute of 23 Geo. III. c. 49. and it is hereby enacted, that from and after the 1st of August 1791, all the several rates and duties thereby imposed shall cease, and that then all the powers and authorities given or granted by that, or any subsequent act relating to the said rates and duties, for levying, raising, or accounting for the same, and all penalties and forfeitures relating thereto shall also cease; save as to any arrears, and the powers, provisions, and remedies for recovering the same. sect. 1.

SECT. 2. That from and after the 1st of August 1791, for every piece of vellum or parchment, or sheet or piece of paper, upon which any bill of exchange, draft, or order for the payment of money on *demand*, shall be engrossed, written, or printed,

where

^b 2 Black. Com. 467.

where the sum expressed therein, or made payable thereby, shall amount to 40s. and shall not exceed 5l. 5s. there shall be *s. d.* charged a stamp duty of - - 0 3

Where such sum shall exceed 5l. 5s. and not 30l. 0 6

Where it shall exceed 30l. and not 50l. 0 9

Where it shall exceed 50l. and not 100l. 1 0

Where it shall exceed 100l. and not 200l. 1 6

That the same duties shall be paid for *promissory notes payable to the bearer on demand*, which may be *re-issuable* from time to time, after payment at the place where first issued, in manner herein after directed (in sect. 7.), but not otherwise.

For every such note which may be re-issued from time to time, after any payment at the same place, or any other place than where the same was first issued in the manner herein-after directed (in sect. 8.). Where the sum made payable there- *s. d.* by shall not exceed 5l. 5s. shall be a stamp duty of 0 6

Where such sum shall exceed 5l. 5s. and not 30l. 1 0

For bills of exchange, drafts, or orders, payable *otherwise than on demand*; and all promissory, or other notes payable otherwise than to the bearer on demand, Where the sum made payable thereby shall amount to 40s. and not exceed 30l. shall be *s. d.* a stamp duty of - - 0 6

Where such sum shall exceed 30l. and not 50l. 0 9

Where it shall exceed 50l. and not 100l. 1 0

Where it shall exceed 100l. and not 200l. 1 6

For bills of exchange, promissory, or other notes, drafts, or orders, payable *on demand, or otherwise*, Where the sum expressed therein, or made payable thereby, shall exceed 200l. *s. d.* shall be a stamp duty of - - 2 0

All which rates and duties shall be payable and paid by the person or persons respectively making or signing such bills of exchange, promissory notes, or other notes, drafts, or orders.

SECT. 3. [*Concerning Foreign Bills.*] Nothing in this act contained shall extend, or be construed to extend, to charge any foreign bill of exchange, which shall be drawn in setts, according to the custom of merchants, with any higher rate or duty than the rate following; viz. Where the sum expressed in such bills, or made payable thereby, shall not exceed 100l. there *s. d.* shall be charged a stamp duty of - - 0 6

Where such sum shall exceed 100l. and not 200l. 0 9

Where it shall exceed 200l. - 1 0

Provided that every bill of each sett of such bills so drawn shall be charged, and every such bill is hereby declared to be chargeable with the like duty, according to the rate above-mentioned.

[*This duty on foreign bills is required on those drawn in Great Britain upon foreign countries. Bills drawn in setts are treated on in C. III. § 11. par. 4.*]

SECT. 4, 5. [*Drafts on Bankers, Bank Notes, and Bills, exempt from Duty.*] Nothing in this act contained shall extend, or be construed to extend, to charge any draft or order for the payment of money to the bearer on demand, bearing date on or before the day on which the same shall be issued, and at the place from which the same shall be drawn and issued, and drawn upon any banker or bankers, or person or persons acting as a banker or bankers, and residing and transacting the business of a banker or bankers, within *ten* miles of the place where such draft or order shall be actually drawn and issued.

And all notes and bills whatsoever, which shall be issued by or on account of the governor and company of the bank of England, shall be freed and exempted from all and every the stamp duties herein-before imposed, upon the terms and conditions, that the said governor and company shall pay, into the receipt of his Majesty's Exchequer at Westminster, the full annual sum of 12,000*l.* by equal half-yearly payments, to be made on or before the 10th day of October, and the 5th day of April in every year; the first payment thereof to be made on or before the 10th day of October 1791.

SECT. 6. [*Persons drawing Bills, &c. contrary to this Act, to be answerable for the duty.*] If any bill of exchange, promissory note, or other note, draft, or order, for the payment of any sum or sums of money amounting to 40*s.* or upwards, by this act intended to be stamped as aforesaid, shall, contrary to the true intent and meaning of this act, be ingrossed, written, or printed on vellum, parchment, or paper, which shall not be stamped or marked, according to the direction of this act, or which shall be stamped or marked with a stamp or mark of a lower denomination or value than by this act is directed, then, and in every such case, there shall be due, answered, and paid to his Majesty, his heirs and successors, the full rate or duty by this act chargeable thereon as aforesaid, and which rate or duty shall be payable by and charged upon all and every person and persons, severally and respectively, who shall draw or make, and utter and negotiate, any such bill of exchange, promissory note, or other note, draft, or order, on such vellum, parchment, or paper not stamped, or stamped with such lower duty as aforesaid, his, her, and their respective executors, administrators, and assigns.

SECT. 7. [*Notes re-issuable at the Place where first issued. Regulations respecting them.*] In all cases, where any promissory note, or other note, for the payment of money to the bearer on demand, which shall contain any sum not exceeding 5*l.* 5*s.* and shall be marked or stamped with a mark or stamp, to denote the rate or duty of 3*d.* by this act imposed; and also where any such note
which

which shall contain any sum exceeding 5l. 5s. and not exceeding 30l. and shall be marked or stamped with a mark or stamp, to denote the rate or duty of 6d. hereby imposed; and also where any such notes which shall respectively contain any sum exceeding 30l. and not exceeding 200l. and shall be marked or stamped with any the respective marks or stamps, to denote the rates and duties respectively by this act imposed on the same in manner herein before directed, shall, at any time, after the 1st day of August, 1791, be paid by the person or persons *by whom made or signed, and first issued or negotiated*, and at *the place where the same were first issued and negotiated*, it shall be lawful for the person or persons so paying the same, notwithstanding such payment thereof, at any time afterwards, and so, from time to time, so often as there shall be occasion, *after every such payment thereof*, but not otherwise, again to issue, utter, or negotiate such promissory notes, or other notes, so respectively stamped as aforesaid, in such and the like manner as the same were first issued or negotiated; and every such note so stamped as aforesaid is declared to be, after any such payment thereof, but not otherwise, again issuable and negotiable, in such and the like manner, and to such and the like uses, intents, and purposes, as and for which the same was first issued or negotiated. And every such note, so stamped as last aforesaid, which, at any time or times after the first day of August 1791, shall be paid by any person or persons, *other than the person or persons making or signing the same*, or at any place *other than the place of issuing the same in pursuance of any direction, nomination, or appointment for the payment thereof*, contained or expressed in or upon such note, shall be taken and construed to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or transferable to any intent or purpose whatever, but shall be forthwith cancelled; and if any person or persons shall again issue, utter, or negotiate, or cause to be again issued, uttered, or negotiated, any such promissory or other note, after any payment thereof by any person or persons *other than the person or persons making or signing the same*, or at any place other than the place of issuing the same, in manner last mentioned; or if any person or persons named or described in such note for the payment thereof, shall, after such payment thereof in manner last mentioned, neglect or refuse to cancel the same, or cause the same to be cancelled, every such person or persons, so offending, shall, for every such offence, forfeit the sum of *twenty pounds*; and if any such note, so stamped as last aforesaid, shall not be cancelled as is before directed, but shall be again issued, uttered, or negotiated, contrary to this act, then, and in every such case, and from time to time as often as such note shall be again issued, uttered, or negotiated, there shall be due, answered, and paid to

his Majesty, his heirs and successors, the like rate or duty which shall appear to have been charged thereon before the first issuing the same, or which is by this act chargeable thereon as aforesaid; and which rate or duty shall be payable by and charged on all and every person or persons severally and respectively who shall again issue, utter, or negotiate any such note or notes, or shall cause or procure any such note or notes to be again issued, uttered or negotiated contrary to this act, his, her, and their respective executors, administrators, and assigns.

SECT. 8. [*Notes re-issuable by Granter or any other Person.*] All promissory notes, or other notes for the payment of money to the bearer on demand respectively, not exceeding the several sums of 5l. 5s. or 30l. as aforesaid, which shall be respectively stamped with the duties of 6d. or 1s. by this act imposed in manner before directed, shall and by this act are declared to be re-issuable, and may be again issued and negotiated, by virtue of this act, by the person or persons making or signing the same, to such and the like uses, intents, and purposes, as and for which the same were first issued or negotiated, notwithstanding such notes shall have been presented to, and paid by the person or persons making or signing the same, or shall have been presented to or paid by any other person or persons in pursuance of any such direction, nomination, or appointment as aforesaid, for the payment thereof, or otherwise howsoever; and so from time to time, as often as occasion shall require, notwithstanding any payment or payments thereof.

SECT. 9. [*Notes re-issued payable to the Holders.*] Every such promissory or other note, for the payment of money to the bearer on demand, which shall be issuable or issued after such payment or payments as aforesaid, in pursuance of this act, shall be taken and construed to be by virtue thereof due and payable to, and the property of, the person or persons holding the same, notwithstanding such payment or payments as aforesaid, and such person or persons shall be possessed thereof in such manner as he, she, or they would or might be possessed thereof, or intitled thereunto, upon or before the first issuing the same, and shall and may maintain an action thereupon in such manner as he, she, or they might do, and have all the like remedies in law as he, she, or they might have had upon or before the first issuing the same.

SECT. 10. [*Penalty on Persons signing unstamped Bills, &c.*] All and every person or persons who, from and after the said 1st day of August 1791, shall write or sign, or cause to be written or signed, or who shall accept or pay, or cause to be accepted or paid, any bill of exchange, promissory note, or other note, draft,
or

or order, liable to any of the duties by this act imposed upon any piece of vellum, parchment or paper, without the same being first duly stamped or marked with a proper stamp or mark in the manner herein prescribed, or upon which there shall not be some stamp or mark resembling the same, shall, for every such offence, forfeit and pay the sum of twenty pounds, to be recovered as herein-after is directed.

SECT. 11. [*No Person by virtue of this act to make any Bills, &c. but as might have lawfully been done before.*] No person or persons shall have power, by virtue of this act, to make any bills of exchange, promissory notes, or other notes, drafts, or orders, for the payment of any sum or sums of money, in any other manner than they might have lawfully made the same before the passing of this act, and as if this act had not been passed.

SECT. 12. [*RECEIPT Rates and Duties to be paid from the 1st of August 1791.*] For every piece of vellum or parchment, or sheet or piece of paper, upon which any receipt, discharge or acquittance given for or upon the payment of money amounting to 40s. and not to 20l. shall be engrossed, written, or print-

ed, there shall be charged a stamp duty of - - - d. 2

Where the payment amount to 20l. and not to 50l. - - - 4

Where it amount to 50l. or upwards - - - 6

Where the receipt is in full of all demands [as here- }
after described in Sect. 16.] - - - 6

Which rates and duties shall be paid and payable by the person or persons by whom or on whose behalf such receipts, discharges, or acquittances shall be required, except the duties on such receipts, discharges, or acquittances, as shall be at any time or times given upon the payment of money in respect of any salary, pension, debt, or other sum payable from his Majesty, his heirs or successors, in which case the duty shall be paid by the person or persons giving such receipts, discharges, or acquittances.

SECT. 13. [*Exemptions from the Duty.*] Nothing in this act contained shall extend, or be construed to extend, to any receipt or other discharge given for any legacy, or share or part of a personal estate divided by force of the statute of distributions, or the custom of any province or place, duly stamped according to the directions of any act or acts of parliament now in force, or to any receipt to be given by the treasurer of the navy for any money imprested to, or received by him for the service of the navy, or to the receipt of any agent for money imprested by or to him on account of the pay of the army or ordnance, or to any receipt to be given by any officer, seaman, or soldier, or their representative respectively, for or on account of any wages, pay,

or pension due to them from the navy, army, or ordnance offices respectively, nor to any receipt to be given for the consideration of the purchase of any share in any public stock or fund, or in the stocks of the corporations of the Bank of England, East India company, or South sea company, or for the dividends paid or payable on such shares of the said stocks, nor to any receipt given for money deposited in the banks of England or Scotland, or in the house of any banker or bankers, nor to any receipt, discharge, or acquittance written on the back of any bill of exchange, promissory note, or other note duly stamped according to the directions of this act, or on the back of any foreign bill of exchange payable in Great Britain; nor to any release or acquittance by deed duly stamped according to the directions of any law now in force; any thing herein before contained to the contrary thereof notwithstanding.

SECT. 14. [*Further Exemptions.*] Nothing in this act contained shall extend, or be construed to extend, to any receipt, discharge, or acquittance, to be given upon any bill or note of the governor and company of the bank of England, or to any letter acknowledging the safe arrival of any bills, notes, or other securities for money, or to any receipt, discharge, or acquittance indorsed on or contained in the body of any deed, bond, mortgage, or other instrument acknowledging the payment or repayment of any part of any principal sum, or any interest thereupon, lent, paid, or secured in, by, or upon such deed, bond, mortgage, or other instrument duly stamped according to the directions of former acts; nor to any receipt, discharge, or acquittance given or required to be given for any money payable by law to any merchants for drawbacks or bounties upon the exportation of any goods or merchandizes from this kingdom; nor to any certificates of over-entry of any duties of customs; any thing in this act, or any other act or acts of parliament, to the contrary notwithstanding.

SECT. 15. [*The full sum to be expressed in Receipts; and any Note, &c. given upon the Payment of Money, to be liable to Duty.*] The full and just sum of money for which any receipt, discharge, or acquittance shall be given, and the true date thereof shall be *bona fide* respectively inserted therein; and all notes, memorandums, or writings whatever, given to any person or persons for or upon the payment of money amounting to 40s. or upwards, whereby any sum of money shall be acknowledged to have been paid, settled, received, accounted for, discharged, released, or in any manner satisfied, or which shall in any manner signify or denote such acknowledgement as aforesaid, and whether the same shall or shall not be signed by or with the name or
names

names of the person or persons by or on whose behalf the same shall be given, shall be respectively taken and construed to be receipts within the true intent and meaning of this act, and shall be liable to the respective duties imposed thereon.

SECT. 16. [*Receipts, &c. in full liable to a Duty of 6d. No unstamped Receipt, &c. available in Law.*] Every receipt, discharge, or acquittance, note, memorandum, or writing whatever, given to any person or persons for or upon the payment of money which shall contain or express, or in any manner signify or denote, any general acknowledgement of any debt, claim, account, or demand, or all or any debts, claims, accounts, or demands being paid, settled, received, accounted for, balanced, discharged, released, or satisfied, or whereby any sum of money therein mentioned shall be acknowledged to be in full or in discharge or satisfaction of all or any such debts, claims, accounts, or demands, or intended so to be, and whether the same shall or shall not be signed by or with the name or names of the person or persons by or on whose behalf the same shall be given, shall be deemed and taken to be a receipt for the sum of 50l. and upwards within the true intent and meaning of this act, and shall be liable to the stamp duty of six pence by this act imposed thereon; and no such receipt, discharge, or acquittance, note, memorandum, or writing, shall be pleaded or given in evidence in any court, or admitted in any court, to be useful or available in law or equity as an acknowledgement of any debts, claims, accounts, or demands being paid, settled, received, accounted for, balanced, discharged, released, or satisfied, whether generally or otherwise, or for any other or greater sum of money than the sum of money therein expressed, unless the same shall be stamped with the proper stamp to denote the said duty of 6d. hereby imposed; any thing in such receipt, discharge, acquittance, note, memorandum, or writing expressed notwithstanding.

SECT. 17. [*Penalties on Persons signing, &c. Receipts unstamped, &c.*] All and every person or persons, who, from and after the 1st day of August 1791, shall write or sign, or cause to be written or signed, or who shall accept, or cause to be accepted, any receipt, discharge, or acquittance, given for or upon the payment of money liable to any stamp duty charged by this act upon any piece of vellum, parchment, or paper, without the same being first duly stamped or marked with a proper stamp or mark as herein is directed, or upon which there shall not be some stamp or mark resembling the same, shall forfeit and pay the sum of 40s., in case the sum paid or contained in such receipt, discharge, or acquittance, shall not amount to the sum of 20l.; the sum of 5l., in case such sum shall amount to 20l., and shall

shall not amount to 50l.; and the sum of 10l. in case such sum shall amount to 50l. or upwards; and all and every person or persons who shall give or accept any receipt, discharge, or acquittance, or any note, memorandum, or writing, acknowledging the payment of money, in which a less sum shall be expressed than the sum actually paid or received, or on which there shall be a stamp or mark of lower denomination or value than is hereby charged in respect thereof, or who shall separate or divide the sum actually paid or received into divers sums, with intent to evade the said duties, or any of them, or who shall be guilty of, or concerned in, any fraudulent contrivance or device whatsoever, with intent or design to defraud his Majesty, his heirs or successors, of any of the said duties by this act imposed, shall, for every such offence, forfeit and pay the sum of 20l. to be recovered in manner as hereinafter is directed.

SECT. 18. [*Duties to be under the Management of the Commissioners for Stamps.*]

SECT. 19. [*Vellum, &c. to be stamped before written upon, &c.*] All vellum, parchment, and paper, liable to any stamp duty by this act, shall, before any of the matters or things hereby charged shall be ingrossed, printed, or written thereupon, be brought to the head office for stamping or marking vellum, parchment, or paper, and the said commissioners by themselves, or by their officers employed under them, shall and may, from time to time, stamp and mark as this act directs, any quantities or parcels of vellum, parchment, or paper, before any of the matters or things hereby charged shall be engrossed, printed or written thereupon, upon payment of the several duties payable for the same by virtue of this act; and no bill of exchange, promissory note, or other note, draft, or order, nor any receipt, discharge, acquittance, note, memorandum, or writing aforesaid, liable to the duties by this act imposed, or any of them, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless the vellum, parchment, or paper, on which such bill of exchange, promissory note, or other note, draft, or order, receipt, discharge, acquittance, note, memorandum, or writing as aforesaid, shall be engrossed, printed, written or made, shall be stamped or marked with a lawful stamp or mark, to denote the rate or duty as by this act is directed, or some higher rate or duty in this act contained; and it shall not be lawful for the said commissioners, or their officers, to stamp or mark any vellum, parchment, or paper, with any stamp or mark directed to be used or provided by virtue of this act, at any time after any bill of exchange, promissory note, or other note, draft, or order, or any receipt, discharge,

charge, or acquittance, except as herein is otherwise provided, shall be engrossed, written, or printed thereon, under any pretence whatever; any thing in this act contained, or any law or statute to the contrary thereof notwithstanding.

SECT. 20, 21.] *Receipts and Acquittances given upon payment of Money, not Stampd, may be Stampd within the Times herein prescribed, upon Payment of the Sums herein mentioned; and in that case the Parties not liable to any Penalty.*] Every receipt, discharge, or acquittance given upon the payment of money, and written on vellum, parchment, or paper, not stamped as aforesaid, which shall be brought to the said commissioners, or their officers employed by them for that purpose, to be stamped according to the directions of this act, within the space of fourteen days after such receipt, discharge, or acquittance shall be given, or shall bear date, shall and may be permitted to be stamped, on payment of the sum of 40s. over and above the duty payable for the same by virtue of this act; and every such receipt, discharge, or acquittance, which shall be brought to be stamped as aforesaid, after the expiration of such fourteen days, and within one calendar month after such receipt, discharge, or acquittance shall be given, or shall bear date, shall and may be permitted to be stamped, on payment of the sum of five pounds, over and above the duty payable for the same, by virtue of this act; and the proper officer or officers are hereby enjoined and required upon such receipt, discharge, or acquittance, being brought to them, within the respective time herein-before limited, and upon payment of the duty, and the respective sums aforesaid, but not otherwise, to mark or stamp such receipt, discharge, or acquittance, with the proper mark or stamp by this act required for the same. And nothing herein contained shall extend, or be construed to extend, to subject any person or persons to any penalty or forfeiture in respect of any receipt, discharge, or acquittance accepted, or caused to be accepted by him or them, on vellum, parchment, or paper not stamped, in case such receipt, discharge, or acquittance shall be brought to the said commissioners or their officers employed under them to be stamped as by this act is directed; and the duties payable for the same, together with such penalty as by this act is directed, shall be paid into the hands of such officer or officers within the times herein-before respectively mentioned, nor to subject any such person or persons to any such penalty or forfeiture in respect of such receipt, discharge, or acquittance, so accepted by him or them as aforesaid, until the expiration of such calendar month after such receipt, discharge, or acquittance shall be given, or shall bear date as aforesaid.

SECT. 22. [*Commissioners of Stamps may authorise unstampd Books to be used in public Offices, &c. for taking Receipts.*] No officer

officer or other person shall be subject to any penalties, forfeitures, disabilities, or incapacities in this or any former act mentioned for writing or accepting any receipts, discharges, or acquittances by this act charged as aforesaid, given to him or them in respect of any publick office or employment, on any book or books belonging to any publick office, or the office of any corporation or company, or in any court of law or equity in Great Britain, without any marks or stamps thereon, which shall have been first shewn to, and signed by the commissioners of stamps for the time being appointed to put this act in execution, or any three of them, or some officer or officers by them, or the major part of them, for that purpose authorised and impowered to signify his or their approbation or consent (and which the said commissioners, or any three or more of them, may allow or refuse at their discretion in all cases), that the receipts, discharges, or acquittances, to be written on such book or books, may be therein written without any marks or stamps thereon, so as the person or persons having the custody of such book or books, do, from time to time (when and as often as he or they shall be thereto required), permit the said commissioners, or any of them, or any officer or agent by them, or the major part of them, for that purpose appointed, to inspect and view such book and books, and do also (from time to time when and as often as he or they shall be thereto required by the said commissioners, or the major part of them, or any other by them, or the major part of them authorised) pay unto the receiver-general for the time being of the said duties, all such sum and sums of money which, according to the true intent and meaning of this act, ought to be paid in respect of such receipts, discharges, and acquittances, as aforesaid, as shall be written in such book or books, any thing herein contained to the contrary thereof notwithstanding.

SECT. 23. [*Vellum, &c. stampd under 23 Geo. III. Cap. 49. may, within 30 days after 1st August 1791, be exchanged at the Stamp Office.*]

SECT. 24. [*How penalties are to be divided, and recovered.*] One moiety of all pecuniary penalties and forfeitures hereby imposed, shall (if sued for within the space of three calendar months from the time of any such penalty or forfeiture being incurred) be to his Majesty, his heirs and successors, and the other moiety thereof, with full costs of suit, to the person or persons who shall inform or sue for the same within the time aforesaid; and which shall and may be sued for in any of his Majesty's courts at Westminster, for offences committed in England, and in his Majesty's court of exchequer at Edinburgh, for offences committed in Scotland, by action of debt, bill, plaint, or information, wherein

no effoin, privilege, wager of law, or more than one imparlance, shall be allowed.

SECT. 25. [*Justices may determine Offences which subject the Parties to pecuniary Penalties. But Persons aggrieved may Appeal to the Quarter Sessions.*] It shall and may be lawful to and for any justice of the peace, residing near the place where the offence shall be committed, to hear and determine any offence against this act, which subjects the offender to any pecuniary penalty; which said justice of the peace is hereby authorized and required, upon any information exhibited, or complaint made in that behalf, within three calendar months after the offence committed, to summon the party accused; and also the witnesses on either side, and to examine into the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witness or witnesses, to give judgment or sentence for the penalty or forfeiture as in and by this act is directed to be divided, one moiety thereof to his Majesty, his heirs or successors, and the other moiety thereof to the informer or informers; and to award and issue out his warrant under his hand and seal, for the levying the said penalty so adjudged on the goods of the offender, and to cause sale to be made thereof in case they shall not be redeemed within six days, rendering to the party the overplus (if any); and where the goods of such offender cannot be found sufficient to answer the penalty, to commit such offender to prison; there to remain for the space of three calendar months, unless such pecuniary penalty shall be sooner paid and satisfied, and if any person or persons shall find himself or themselves aggrieved by the judgment of any such justice, then he or they shall and may, upon giving security to the amount of the value of such penalty and forfeiture, together with such costs as shall be awarded in case such judgment shall be affirmed, appeal to the justices of the peace, at the next general or quarter sessions for the county, riding, or place, which shall happen after fourteen days next after such conviction shall have been made, and of which appeal reasonable notice shall be given, who are hereby empowered to summon and examine witnesses upon oath, and finally to hear and determine the same; and in case the judgment of such justice shall be affirmed, it shall be lawful for such justices to award the person or persons appealing, to pay such costs occasioned by such appeal as to them shall seem meet.

SECT. 26. [*Penalties may be mitigated.*] It shall and may be lawful to and for the said justice, where he shall see cause, to mitigate and lessen any such penalties as he shall think fit, (reasonable costs and charges of the officers and informers, as well in making the discovery, as in prosecuting the same, being always allowed

allowed over and above such mitigation), and so as such mitigation do not reduce the penalties to less than a moiety of the penalties incurred over and above the said costs and charges; any thing contained in this act, or any other act of Parliament, to the contrary notwithstanding.

SECT. 27. [*Witnesses not attending, &c. to forfeit 40s.*] If any person or persons shall be summoned as a witness or witnesses, to give evidence before such justice or justices, touching any of the matters relative to this act, and shall neglect or refuse to appear at the time and place to be for that purpose appointed, his or her reasonable excuse for such neglect or refusal to be allowed of by such justice or justices of the peace, or appearing shall refuse to be examined on oath, and give evidence before whom the prosecution shall be depending, that then every such person shall forfeit, for every such offence, the sum of forty shillings, to be levied and paid in such manner and by such means as is herein directed as to other penalties.

SECT. 28. [*Penalties not prosecuted for within the limited Time, recoverable only as herein mentioned.*] In default of prosecution within the time herein-before limited, no such penalty or forfeiture shall be afterwards recoverable, except in the name of his Majesty's attorney-general in England, or advocate in Scotland; by information in the respective courts aforesaid, in which case the whole of such penalty or forfeiture shall belong to his Majesty, his heirs and successors; and that all penalties and forfeitures, and shares of penalties and forfeitures incurred as aforesaid, belonging to his Majesty, his heirs or successors, shall be paid into the hands of the receiver-general of his Majesty's stamp duties for the time being; and that in all cases where the whole of such pecuniary penalties or forfeitures shall be recovered to the use of his Majesty, his heirs or successors, it shall be lawful for the said commissioners to cause such reward as they shall think fit, not exceeding one moiety of such penalties or forfeitures so recovered, after deducting all charges and expences incurred in recovering the same, to be paid thereout, to or amongst any person or persons who shall appear to them entitled thereto as informers, in respect of such penalties or forfeitures so recovered; any thing herein contained to the contrary notwithstanding.

SECT. 29. [*Persons counterfeiting Stamps, &c. guilty of Felony.*] If any person shall counterfeit or forge, or procure to be counterfeited or forged any stamp, or mark, directed or allowed to be used or provided, made or used in pursuance of this act for the purpose of denoting any of the duties by this act granted, or shall counterfeit or resemble the impression of the same upon any vellum,

vellum, parchment, or paper, with intention to defraud his Majesty, his heirs or successors, of any of the said duties, or shall utter, vend, sell, or expose to sale, any vellum, parchment, or paper, liable to the said duties, with such counterfeit mark or impression thereupon, knowing the same to be counterfeited, or shall privately or fraudulently use any stamp or mark, directed or allowed to be used by this act, with intent to defraud his Majesty, his heirs or successors, of any of the said duties, every person so offending, and being thereof lawfully convicted, shall be adjudged a felon, and shall suffer death as in cases of felony without benefit of clergy.

SECT. 30. [*All Powers respecting the present Duties, to extend to this Act.*] All powers, provisions, articles, clauses, allowances on present payment of the duties, and all other matters and things prescribed or appointed by any former act or acts of parliament relating to the stamp duties on vellum, parchment, and paper (and not hereby altered), shall be of full force and effect, with relation to the duties hereby imposed, and shall be applied and put in execution for the raising, levying, collecting, and securing the said duties hereby imposed, according to the true intent and meaning of this act, as fully and effectually, to all intents and purposes, as if the same had severally and respectively been hereby re-enacted with relation to the said duties hereby imposed.

SECT. 31, 32, 33, 34. [*Duties to be paid to the Receiver-General of Stamp Duties, and by him paid into the Exchequer.—Till payment of 1,833,000l. and interest as herein after-mentioned.—Duties paid into the Exchequer are to be kept separate from other Monies.—Duties paid into the Exchequer, on or before April 5, 1792, to be carried to the Consolidated Fund, and afterwards 32,150l. thereof to be applied quarterly to that Fund, and the remainder applied towards discharging 1,833,000l. to be raised by Exchequer Bills and Interest.—After Payment of the said 1,833,000l. and Interest, the Duties to be carried to the Consolidated Fund.*]

SECT. 35. [*Persons sued, in pursuance of this Act, may plead the General Issue, and if Verdict pass for them have treble costs.*] If any person or persons shall, at any time or times, be sued, molested, or prosecuted for any thing by him or them done or executed in pursuance of this act, or of any clause, matter, or thing herein contained, such person or persons shall or may plead the general issue, and give the special matter in evidence for his or their defence; and if upon the trial, a verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs become nonsuited, then such defendant or defendants shall have treble costs awarded to him or them against such plaintiff or plaintiffs.

§ III. COPY of statute 32 Geo. III. c. 51. entitled *An Act to exempt certain Letters passing between Merchants and other Persons carrying*

on Trade or Commerce in this Kingdom, containing Agreements with respect to Merchandize, Notes, or Bills of Exchange, from the Stamp Duty now imposed on written Agreements.

“ WHEREAS by an act passed in the twenty-third year of the reign of his present majesty^c intituled, an act for granting to his majesty several additional and new duties upon stamped vellum, parchment, and paper; and also for repealing certain exemptions from the stamp duties; it is (amongst other things) enacted, that for every skin or piece of vellum or parchment, or sheet or piece of paper, on which any agreement shall be engrossed, written or printed, whether the same shall be only evidence of the contract, or obligatory upon the parties from its being a written instrument, there shall be charged a stamp duty of six shillings, in which said act certain exceptions by way of provision are made: And Whereas doubts have been entertained respecting the operation of the said act, upon correspondence between merchants resident in different parts of this kingdom, which if subject to the effects of the said act, and not within the provisions by way of exception thereto, would be attended with many evils towards the commerce of this country, and would much tend to the injury thereof; be it therefore enacted by the king’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said recited clause in the said act contained shall not extend, or be deemed, taken, or construed to extend, to make liable to the said stamp duty of six shillings, any letter or letters, passing by the post between merchants, or other persons carrying on trade or commerce in this kingdom, and residing at the distance of fifty miles from each other, for or by reason of such letter or letters containing an agreement in respect of any merchandize, notes, or bills of exchange, or evidence of such an agreement, but that such letter or letters may be received in evidence of such agreement as aforesaid although the same be not stamped. f. 1.

SECT. 2. “ PROVIDED always, that this act shall not extend to any letter or correspondence passing between persons who are residents of the same town, city, or place, nor to any letter or correspondence, written or so passing as aforesaid, between persons not, at the time of writing or sending thereof, at the actual distance of fifty miles from each other.

SECT. 3. “ AND be it further enacted, that all such letters as aforesaid, which have heretofore passed between such persons as aforesaid, may be given in evidence in any court of law or equity; any thing in the said recited act to the contrary notwithstanding.”

CHAP.

CHAPTER. II.

Of Bills and Notes restrained in their Negotiation, and such as are held not to be negotiable. Bills made payable to a fictitious Payee. Of Bills and Notes which are held to be negotiable, and the Nature and Effects thereof.

BILLS of exchange and promissory notes, having been briefly described in our preceding chapter, and the stamps whereon the same are required to be written or printed pointed out, we shall, in our first section of this, treat on the restraint on negotiating such as are drawn for less than 20s. and 5l. In § II. on those which are held not to be negotiable, and on bills made payable to a fictitious payee. In § III. on bills and notes which are held to be negotiable. In § IV. on the nature and effects of negotiable bills and notes.

§ I. AS to the restraint on the negotiation of bills and notes drawn for less than 20s. and 5l. By statute 15 Geo. III. c. 51. after reciting that various notes, bills of exchange, and drafts for very small sums of money, had for some time past been circulated or negotiated in lieu of cash in England, to the great prejudice of trade and public credit; and many of such bills and drafts being payable under certain terms and restrictions, which the poorer sort of manufacturers, artificers, labourers, and others, could not comply with, without being subject to great extortion and abuse: it is enacted, that all notes, bills, drafts, or undertakings in writing, being negotiable or transferrable, for the payment of any sum or sums of money, less than 20s. in the whole, which shall be made and issued after the 24th of June 1775, shall be void. And, that if any person, by any means whatever, publish or negotiate any such notes, &c. or on which less than 20s. shall be due, he shall pay 20l. or not less than 5l.—The same to be recovered in such manner as we shall hereafter mention.

By statute 17 Geo. III. c. 30. after reciting the above-mentioned act of 15 Geo. III. and that the same had been attended with very salutary effects; and that in case the provisions thereof were extended to a further sum, the good purposes of it would be further advanced: it is enacted, that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing being negotiable or transferrable, for the payment of 20s. or above, and less than 5l. that shall remain undischarged, and made within England, after the 1st

of January 1778, shall specify the names and places of abode of the respective persons to whom, or to whose order the same shall be made payable, and shall be dated before or when drawn, and not on any subsequent day, and be payable within 21 days after their date, and not negotiable after their time of payment; and that every indorsement shall be before the time of payment, and be dated at or before the time of making thereof; and shall specify the name and place of abode of the person to whom, or to whose order, the money is to be paid; and that the signing of every such note, &c. and indorsement, shall be attested by a witness, and drawn agreeable to the forms described in the act, the substance whereof are as follows:

No. I.

Manchester, 5th June, 1778.

Twenty Days after Date, I promise to pay *Abraham Craft*, of *Fetter-Lane, London*, or his Order, the Sum of Four Pounds Fourteen Shillings, for Value received by

Witness
Francis Goring.

David Evans.

And the indorsement, *toties quoties*.^c

12th June, 1778.

Pay the Contents to *Henry Jenkins*, of *Cheapside, London*, or his Order.

Witness
Katharine Surry.

Abraham Craft.

No. II.

Exeter, 20th July, 1778.

Twenty - one Days after Date, pay to *Moses Newel*, of *Fleet - Street, London*, or his Order, the Sum of Three Pounds, Value received, as advised by
To Richard Syms, of *Shoreditch, in the County of Middlesex.*

Oliver Prade.

Witness
Thomas Urn.

And the Indorsement, *toties quoties*.

Pay the Contents to *William Yates*, of *Milk-Street, Cheapside, London*, or his Order.

Witness
Andrew Baker.

Moses Newel.

THOSE being in effect the forms pointed out by this statute, it is thereby enacted, that all notes, &c. being negotiable or trans-

^c *Toties quoties* are words used in statutes, deeds, and conveyances, and signify as often as a thing shall happen.

transferrable for the payment of 20s. or in which 20s. or above, and less than 5l. shall be undischarged, and issued within England, at any time after the 1st January 1778, in any other manner than as aforesaid, and also every indorsement shall be void. And the publishing or negotiating in England any note, &c. of or under the above-mentioned value, made in any other manner than by this act permitted, and also negotiating such last-mentioned notes, &c. after the time aforesaid, is prohibited, under the like penalties and forfeitures, and to be recovered and applied as directed by 15 Geo. III. c. 51. which is by summary proceeding before a justice of the peace. Whereby the before-mentioned penalty of not less than five pounds, nor more than twenty pounds, may be recovered on any person who shall utter, publish, or negotiate notes, bills of exchange, &c. contrary to the method above prescribed. But by the preamble these clauses are not to operate in prejudice to the negotiation of promissory notes, and inland bills of exchange, for the remittance of money in discharge of any balance of account, or other debt^d.

By statute 17 Geo. III. c. 30. all notes, &c. issued before the 1st of January 1778, for any sum between the sum of twenty shillings and five pounds are made payable on demand.—This act and the former were to continue in force not only for the residue of the five years mentioned in the former, but also for the further term of five years. And by statute 27 Geo. III. c. 16. both are made perpetual.

§ 11. 1. AS to bills and notes which are held not to be negotiable. Promissory notes are made negotiable by statute 3 & 4 Ann. as hereafter shewn in § III. par 1. But those are not negotiable unless they be for the payment of money only; an order or promise to pay money and do some other act *ex gratia* (for example); deliver a horse, is not within the statute. Nor if a note be to pay or do some other act; as to deliver an horse or pay if T. S. does not. Neither is a note negotiable unless it be for payment of money in specie; as an order or promise to pay 300l. in three good East India Bonds is not a note within the statute^e.

2. So

^d Leache's Cases in Crown Law, 371.

^e Law of Nisi Prius, 272, 273. Edit. 1785. As this "Law of Nisi Prius" will be frequently cited in subsequent parts of our work, it may be necessary here to mention that it is a book compiled by the present Mr. Justice Buller before he was on the bench, and that the same is now in great repute, the fifth edition being lately published. And as the words *nisi prius* will unavoidably occur in our future proceedings, we shall here for the reader's information briefly describe the import thereof; as that it is similar to assize; courts whereof are composed of commissioners, most usually two of the justices of the courts of King's-bench or Common-pleas, or two of the barons of the Exchequer; or, as usually termed, two of the twelve judges, who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where courts of *nisi prius* are holden in and after

2. So a note is not negotiable where a promise is to pay on an uncertain contingency, such note not being within the act, because it will not answer the intent; nor within the words which import an absolute promise to pay; and therefore a promise to pay upon his marriage, or when he should marry such a one, is not good, as in the case of *Pearson v. Garret*, wherein it was resolved, that if A. give a note to B. for the payment of a sum of money, *when he the said A. should marry such a one*; B. cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c. for that in truth there is no such custom, being only an agreement founded on a marriage-brokage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants^f. And in the case of *Beardesly v. Baldwin*, Easter 14 Geo. II. A promissory note to pay within so many days after the defendant should marry, was on consideration held not to be a negotiable note within the statute^g.

3. AND where a promise was to pay or do another act, it was holden not to be within the statute; as in the case of *Smith v. Bohene*, Mich. 1 Geo. I. where a note was, *I promise to pay 50l. or render the body of J. S. to prison before such a day*; it was adjudged to be no negotiable note within the statute 3 & 4 Ann. and that an action could not be maintained thereon within that law; because the money was not absolutely payable, but depended upon a contingency whether he would surrender J. S. to prison or not^h. So in the case of *Applebye v. Biddulph*, Hil. 3 Geo. I. A promise to pay if his brother did not, was held not to be within the actⁱ.

4. A NOTE promising to pay on the death of G. H. provided he leaves either of us sufficient to pay, or if we shall be otherwise able to pay, is not negotiable, as in the case of *Roberts v. Peake*. Easter, 30 George II. where the note was, *we* (naming the defendant and another person) promise to pay to A. B. 116l. 11s. (value received) on the death of George Henthaw, provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it. The note was signed by the defendant *only*, and an action was brought thereon against him by the indorsee. The plaintiff's counsel on the question, whether this be a negotiable note? argued that there could be no doubt but that, if the note had not the proviso added to it, but had merely

every term, before the chief or other judge of the several superior courts [commonly called the sittings]; and except the four northern counties, where the assises are taken only once a year, to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-hall.

^f 4 Mod. 422. & Str. 1151. ^h Ld. Raym. 1361. ⁱ Law of Nisi Prius, 272.

merely been made payable on the death of George Henshaw, it had been a good negotiable promissory note, within the statute of 3 & 4 Ann. c. 9. For the contingency of the death of G. H. is not such an uncertain contingency, as that the event may possibly or probably never happen; and so the note might perhaps never become payable. But it is an event certain and necessary; and no otherwise nor in any other respect uncertain, than merely as to the particular time when it will happen: so that it is no more than the ordinary case of a promissory note payable at a future day. And to prove this doctrine and that this is a negotiable note, he cited the case of *Cooke v. Colehan* [in § III. par. 3] and the case of *Andrews v. Franklin* [the case next following this]. And argued that, as to the proviso or condition, it is made absolutely payable on George Henshaw's death, an event which will certainly happen; therefore the proviso is repugnant to the body of the note.

But by Lord Mansfield chief justice: This note was payable upon a contingency; and therefore it was not an absolute note. What would it signify to have put all these contingencies, if the party was absolutely, and at all events bound to pay it upon the death of George Henshaw? Most manifestly, it was not intended that he should be bound to pay it upon George Henshaw's death, at all events. This note therefore being payable upon an uncertain contingency, is not a negotiable note. Justices Denison and Foster herewith concurring. Judgment was by the court for the defendant ^k.

5. IN *Andrews v. Franklin*, Hil. 3 Geo. I. In an action upon a promissory note to pay within two months after such a ship is paid off. The plaintiff declares upon the statute of Queen Anne. The counsel for the defendant insisted, that this is not a negotiable note, it being upon a contingency which may never happen. *Jocelyn and Laferre* [in par. 7.], was a bill to pay out of the drawer's growing subsistence; and that was held not to be negotiable as a bill of exchange. But by the court: The paying off the ship is a thing of a public nature, and this is negotiable as a promissory note ^l.

6. THAT bills are not negotiable if payable out of particular and uncertain funds, or upon contingent and uncertain events, will be seen by the cases related in this and the five following paragraphs, viz. par. 7, 8, 9, 10, 11. and in par. 12. that the money should be demanded by holder of a bill though it be not a negotiable bill; and in par. 13. will be a description of the decisions of the courts of law and house of lords concerning bills payable to fictitious persons.—In the case of *Jenney v. Herle*,

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3 Geo.

^k Burr. Rep. 226. ^l Str. 24.

2. So a note is not negotiable where a promise is to pay on an uncertain contingency, such note not being within the act, because it will not answer the intent; nor within the words which import an absolute promise to pay; and therefore a promise to pay upon his marriage, or when he should marry such a one, is not good, as in the case of *Pearson v. Garret*, wherein it was resolved, that if A. give a note to B. for the payment of a sum of money, *when he the said A. should marry such a one*; B. cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c. for that in truth there is no such custom, being only an agreement founded on a marriage-brokage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants^f. And in the case of *Beardeley v. Baldwin*, Easter 14 Geo. II. A promissory note to pay within so many days after the defendant should marry, was on consideration held not to be a negotiable note within the statute^g.

3. AND where a promise was to pay or do another act, it was holden not to be within the statute; as in the case of *Smith v. Bohene*, Mich. 1 Geo. I. where a note was, *I promise to pay 50l. or render the body of J. S. to prison before such a day*; it was adjudged to be no negotiable note within the statute 3 & 4 Ann. and that an action could not be maintained thereon within that law; because the money was not absolutely payable, but depended upon a contingency whether he would surrender J. S. to prison or not^h. So in the case of *Appleby v. Biddulph*, Hil. 3 Geo. I. A promise to pay if his brother did not, was held not to be within the actⁱ.

4. A NOTE promising to pay on the death of G. H. provided he leaves either of us sufficient to pay, or if we shall be otherwise able to pay, is not negotiable, as in the case of *Roberts v. Peake*. Easter, 30 George II. where the note was, *we* (naming the defendant and another person) promise to pay to A. B. 116l. 11s. (value received) on the death of George Henshaw, provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it. The note was signed by the defendant *only*, and an action was brought thereon against him by the indorsee. The plaintiff's counsel on the question, whether this be a negotiable note? argued that there could be no doubt but that, if the note had not the proviso added to it, but had merely

every term, before the chief or other judge of the several superior courts [commonly called the sittings]; and except the four northern counties, where the assises are taken only once a year^j, to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-hall.

^f 4 Mod. 422. ^g Str. 1151. ^h Ld. Raym. 1361. ⁱ Law of Nisi Prius, 272.

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3 Geo.

^k Burr. Rep. 226. ^l Str. 24.

3 Geo. I. A. drew a bill in this form; *Sir, pray pay to H. 1945l. upon demand, out of the money belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West-Buckland.* It was held that this was no such bill of exchange as would entitle H. to an action against the drawer on the custom of merchants; for it is only a direction or appointment to the cashier to pay the money, and that out of a particular fund, and does not answer the necessity of trade, not being a negotiable note nor indorsible over; and charging the drawer on such a note, would be liable to this further inconveniency, that hereby every one who gives his steward an order or authority to pay money, might be charged for non-payment^m.

7. IN *Jocelyn v. Laserre.* 1 Geo. I. where a bill was drawn by an officer upon his agent, requiring him to pay so much out of his *growing subsistence*, it was held no bill of exchange, nor the drawee liable, though he accepted such bill; for it concerns neither trade nor credit; but is to be paid out of the growing subsistence of the drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine. And it would be of dangerous consequence to make those orders which a man gives to his steward or bailiff, no way concerning trade, to be bills of exchangeⁿ.

8. IN *Haydock v. Lynch*, 3 Geo. II. In an action upon the case upon several promises, the plaintiff in his first count, declared, that one Thomas Rogers, 8th August 1728, &c. according to the custom of merchants, his certain bill of exchange with his own hand and in the name of the said Thomas subscribed, did make, dated the same day and year, and directed the said bill of exchange to the said Rogers, and thereby requested the said Rogers to pay the said Henry, or his order 14l. 3s. out of the fifth payment when it should become due, and it should be allowed by the said Thomas, which was afterwards accepted by the defendant; *ratione quorum promissorum*, [by reason of which promises] the defendant became liable to pay the said 14l. 3s. to the plaintiff Henry, and so being liable promised to pay, &c. Then there were other counts in the declaration, to which counts the defendant pleaded *non assumpsit*, &c. and as to this count the defendant demurred. And it was insisted upon by Mr. Parker counsel for the defendant, that this action was not maintainable upon this bill as a bill of exchange, according to the resolutions in the case of *Jocelyn v. Laserre* and *Jenney v. Herle*, [in par. 6, 7.] and of that opinion was the court and gave judgment for the defendant^o.

^m Str. 591.ⁿ Ld. Raym. 1361.^o Ld. Raym. 1563.

9. IN *Banbury v. Lisset and Gilly*, 17 Geo. II. where an order was from the owner of a ship to the freighter to pay money on account of freight, it was held to be no bill of exchange. In this case the plaintiff declared upon the custom of merchants against the defendants as acceptors of a bill of exchange, and the instrument run in these words:

Messrs. Gilly and Co.

Pray pay to Mr. Richard Banbury one month after date two hundred Pounds on account of freight of the Veal Galley, Edward Champion, and this order shall be your sufficient discharge for the same. J. GIBSON.

Accepted for Lisset and Gilly of Leghorne to pay as remitted from thence at Usance.

18th March, 1748. H. GILLY.

HERE two objections were made by the defendants: 1st, That this was not a bill of exchange; for it is not payable to order, so as to be negotiable: It is not said to be *for value received*. And it is only an order upon a particular fund, like the case of *Jenney v. Herle*; [in par. 6.] and several merchants proved that they did not look upon it to be a bill of exchange; and others were of a contrary opinion.

THE chief justice ruled it not to be a bill of exchange. He said it was not in the power of the parties to make what form they pleased pass for such a bill; it ought to be agreeable to the *Lex Mercatoria*: The privilege arises from the convenience to trade, which is not consulted in this case. And he thought it bad upon the objection to the fund out of which it was to be paid: However, being a mercantile transaction, he left it to the special jury of merchants; who found it to be no bill of exchange on the objection for want of *value received*.

THE second objection was, that the plaintiff (supposing it to be a bill of exchange) had not shewn that there was any remittance to the defendants; and that this was not an absolute acceptance, but only conditional. And so the chief justice declared he understood it, and left it to the jury. But they finding for the defendants upon the first point gave no opinion as to this P.—The words “Value received” are now held to be unessential, as shewn in C. III. §. 1. par. 2.

10. IN *Pierce v. Wheatley*. In an action on the case for money had and received to the plaintiff's use, the defendant pleaded *non assumpsit*, and gave notice to set off the following bill of exchange, directed to J. S. “Sir, at six weeks after date pay to *Benjamin Wheatley, Esq;* or order, eight “Guineas for your humble servant, *John Pierce*. London, “August

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"August 23d, 1736." At the trial it was objected, and agreed by the court, first, that this was not a bill of exchange within the custom of merchants, nor could be taken advantage of as such, either by way of set-off or by an action brought upon it; nor would it be any sort of evidence of money lent; there being *no consideration, either appearing on the note, or offered to be proved*, and it is nothing more than the bare power or authority to receive so much to the plaintiff's use. Secondly, that if it had amounted to a bill of exchange, yet the *laches* [negligence] of the defendant, in not demanding the money, and giving notice in case of non-payment for so long a time, would effectually discharge the plaintiff; and accordingly the plaintiff had a verdict, at the sittings in Common Pleas at Westminster, before Lord Chief Justice Willes, after Trin. Term, 1742⁹.

II. In the case of *Dawkes and Wife v. The Earl of Deloraine*, Trin. 11 Geo. III. a bill was drawn as follows. "8th January, 1768, seven weeks after date, pay Miss Read [wife of Dawkes when the action was brought], 32l. 17s. out of W. Steward's money, as soon as you shall receive it, for

"Your humble servant,

"To Timothy Brecknock, Esq.
"St. Mary-le-bone."

"Deloraine."

THIS bill was accepted by Brecknock, who afterwards refused to pay it. On demurrer, Davy, counsel for the defendant, insisted, 1st, That this is no bill of exchange. 2dly, That, if it be, still the defendant is not, at present, chargeable.—Leigh, counsel for the plaintiff, argued, that Brecknock's acceptance was an acknowledgment of his having received the money.

By the court: We deliver no opinion on the omission of the words *value received* and *order*, but confine ourselves to the latter objection, that the bill is drawn payable out of a particular fund, and upon an event which is future, uncertain and contingent, viz. the drawee's having received W. Steward's money. A bill of exchange always implies a personal general credit, not applicable to particular circumstances or events; which cannot be known to the holder of the bill, in a general course of negotiation. *Andrews and Franklin* [in par. 5.], seems indeed an exception to this rule. A promissory note to pay a sum, when the ship *Devonshire* was paid off. But, in the first place, that was a promissory note, and not a bill of exchange; and a note may be certainly payable on a future event. Nor again was the note payable, out of the ship *Devonshire's* fund; but was given on the general credit of the drawer, though payable at a future
and

and uncertain time. But, as this is a hard case (to say no more of it), we will not give our judgment absolutely; but having thus declared our opinions, let there be judgment for the defendant; unless cause shewn to-morrow.—On the morrow, Leigh, plaintiff's counsel, moved, for leave to enter a *non vult prosequi* on the first count in the declaration; and had a rule to shew cause, which was made absolute the last day of term^r.

IN this case as reported in 3 Wils. 207. the court delivering their opinion says, the instrument or writing which constitutes a good bill of exchange, according to the law, usage and custom of merchants, is not confined to any certain form or set of words, yet it must have some essential qualities without which it is no bill of exchange; it must carry with it a *personal* and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*; it is upon the credit of a *person's* hand, as on the hand of the *drawer*, the *indorser*, or the *person* who negotiates it; he to whom such bill is made payable, or indorsed, takes it upon no particular *event* or *contingency*, except the failure of the general *personal* credit of the persons drawing or negotiating the same. In the present case, the *drawer* did not make this writing or instrument upon his own *personal* general credit, that in all events he would be liable in case Brecknock should not pay it out of William Steward's money; but, both the *drawer* and the person to whom payable, look only at the fund, and no personal credit is given to the defendant the *drawer*.

IT was objected at the bar, that this bill is accepted by Brecknock generally, and in an unlimited manner: I answer, if the bill had been drawn accordingly, in a general and unlimited way, both the bill and acceptance would have been good; but the acceptance must mean, that Brecknock accepted it to pay it out of Steward's money, not out of the *drawer's* money; and upon this record it appears, that Brecknock has not received any of Steward's money. I think it would be monstrous to say, that either the *drawer* or *acceptor* ought to pay this 32l. 17s. out of their own money. The case in Ld. Raym. 1481. is not to pay out of a contingency but in all events. And there is no case that I can find, in any book whatsoever, an action would lie, as upon a bill of exchange, where the same was payable out of a *future contingent fund*.

12. IN *Chamberlyn v. Delarive*, 7 Geo. III. It was held that, where a creditor accepts a note or draft of his debtor upon a third person, to be paid a sum of money for value received, if he hold it an unreasonable time before he demands the money, and the person upon whom it is drawn becomes insolvent, it is the creditor's own loss, though this draught be not a bill of exchange

change or negotiable.—Action upon the case was for work and labour done by the plaintiff for the defendant. Upon the general issue, tried before lord chief justice Wilmot. At the trial it appeared in evidence that the defendant being indebted to the plaintiff in 18l. for work done, the defendant gave the plaintiff a note or draught upon one Heddy, whereby the defendant desired Heddy to pay to the plaintiff a few days after date 18l. for value received; the plaintiff took and held this note or draft four months, and never applied to Heddy to demand the money of him; Heddy afterwards broke and became insolvent; the note or draught not being to the plaintiff *Chamberlyn, or order*, the jury looked upon it as not a negotiable bill of exchange or draught, and found a verdict for the plaintiff damages 18l. contrary to the directions and opinion of the lord chief justice; and therefore it was now moved for a new trial without payment of costs.

BY THE COURT. 1st, It was objected for the plaintiff, that this is not a bill of exchange, because it is not negotiable, that it is of the very essence of a bill of exchange to be payable to such a one *or order*, and therefore the plaintiff shall not lose the value thereof, as he would have done if it had been negotiable, by reason of his holding it so long without demanding the money of Heddy; 2dly, That the plaintiff was no more than a servant or agent to the defendant in this case, and could not receive the money for his own use: as to the 1st objection, we think it is not necessary in this case to give any opinion, whether this be a bill of exchange or not, because we are of opinion that when the plaintiff accepted and took from the defendant this note, draught or order, upon Heddy for 18l. to be paid to the plaintiff for value received, the plaintiff acquired an interest in the 18l. and if he had received it of Heddy, he would have received the same for his own use, and not for the use of the defendant the drawer; the plaintiff, by accepting this note or draught, undertook to be duly diligent in trying to get the money of Heddy, and to apprize the defendant the drawer if Heddy failed in payment; the plaintiff substituted himself in the place of the defendant the drawer, who has been deluded into a belief, that the plaintiff had got the money of Heddy. The common law detests *negligence* and *laches*; there is no reason applicable to the case of holding a bill of exchange that is not applicable to this case; the plaintiff by holding this order four months hath discharged the defendant of his debt, and credited Heddy in his stead and place; if this verdict should stand it would be mischievous: if a jury can say that a man may hold such an order or draught as this is ten weeks after it is due, they may as well say he may hold it ten years; here appears to be gross negligence in the plaintiff, and we think the jury shall not pronounce the

the law in such a case as this is, and therefore there must be a new trial upon payment of costs *.

13. WHETHER the amount of a bill payable to a fictitious payee be recoverable in an action, hath been a question which of late hath much agitated the commercial world, and three cases pertaining hereto were brought before the court of King's Bench; and another before the Common Pleas; which cases we shall here attend to, and then to the decisions in the House of Lords, and at the conclusion of the paragraph make some brief observation on the result of the decisions.—The first of these cases was *Tatlock v. Harris* †, before the court of King's Bench, in Easter Term, 29 Geo. III. The second *Vere v. Lewis*, in the same term; and the court thinking this latter not to be distinguished from the former gave judgment for the plaintiff without hearing argument. In those cases the action was against the acceptor; so likewise in the case of *Minet v. Gibson*, before the court in Mich. Term, 30 Geo. III. in which the court likewise gave judgment for the plaintiffs without hearing any argument, adding that they understood that it was agreed to be turned into the shape of a special verdict that it might be carried up to the *dernier resort*.—The question concerning those bills first came before the court of King's Bench on a motion for a new trial; but as it was of so much importance, bills to the value of near a million a year having passed through these houses only, the court recommended it to the parties to consent to have a special verdict, in order that the record might be carried to the House of Lords; and the counsel for both parties, without going to another trial, agreed upon stating this verdict ‡; the substance of which we shall presently relate, after attending to the ensuing case, and relating the substance of the declaration in *Minet v. Gibson*.

THE case before the court of Common Pleas in Hil. 30 Geo. III. was that of *Collis v. Emmet*, in which an action had been brought against the drawer, and a special verdict being found; after arguments thereon, Lord Loughborough delivering the opinion of the court says, A bill of exchange is an authority to pay pursuant to the order of the payee; and it is also an undertaking to pay pursuant to that order. But if there be no person who by any possibility can give such order, the engagement must be to pay the bill. If the order of the person cannot be procured, and with the knowledge and privity of the parties who make the bill, such a name is put in as cannot give an order, it is in effect, and in point of law, the same thing as if he had made it payable to the person who held the bill, namely the bearer. The determination

* 2 Wils. 353.

† Reported in 3 Durnf. and East, Rep. 174.

‡ 3 Durnf. and East, Rep. 483.

mination of the court of King's Bench has approved the same rule, and we think that a right determination*.

IN *Minet v. Gibson*, the first count in the declaration stated, that Livesey and Co. on the 18th February 1788 made a bill of exchange, directed to the defendants, requiring them three months after date to pay 721l. 5s. to John White, or order; Livesey and Co. well knowing that no such person as J. White existed; on which bill an indorsement was made, purporting to be the indorsement of J. White named in the bill, requiring the contents to be paid to Livesey and Co. or order; that Livesey and Co. (by one Absalom Goodrich, by procuration of Livesey and Co.), indorsed to the plaintiffs; and that the defendants accepted it, knowing that no such person as J. White existed, and that the name of J. White so indorsed was not the hand-writing of any person by that name.

The 2d count, after stating the drawing of the bill, as above, proceeds thus: Livesey and Co. knowing that J. White was not a person dealing with, or known to, Livesey and Co. and using the name of J. White in the bill as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually indorsed by him; upon which bill a certain indorsement was made, requiring the payment to be made to Livesey and Co. and that Livesey and Co. indorsed to the plaintiffs, without having delivered the bill to J. White.

The 3d count stated that the bill was made payable to themselves, Livesey and Co. by the name and description of J. White.

The 4th treated it as a common bill payable to J. White or order, and that J. White indorsed it to the plaintiffs.

The 5th as payable to bearer; and that the plaintiffs were the bearers.

The 6th payable to J. White or order; with an averment that, when the bill was made, there was no such person as J. White, the supposed payee, but that the name was merely fictitious; by reason whereof the sum mentioned in the bill became and was payable to the bearer thereof, according to the effect and meaning of the bill;—averring also that the plaintiffs were the bearers and proprietors thereof.

The 7th count stated that there was a partnership, or house, of certain persons using trade as well in the name and firm of Livesey and Co. as in the name and firm of J. White; that the last-mentioned persons made a certain other bill, (the hand of one of them on their joint account, and in their copartnership name and firm of Livesey and Co. being thereto subscribed) and directed it to the defendants, requiring them three months after
date

* 1 H. Black. Rep. 313.

date to pay to the said last-mentioned copartners, by the name of J. White or order, 721l. 5s.; and that the said last-mentioned copartners afterwards by a certain indorsement in writing appointed the contents to be paid to the plaintiffs, and delivered the bill so indorsed to them.

There were also other counts for money had and received by the defendants to the use of the plaintiffs; for money paid, laid out, and expended by the plaintiffs to the use of the defendants, and for money lent and advanced by the plaintiffs to the defendants^w.—Those are usually termed the money counts, a description whereof is in C. IX. § 1. par. 2.

THE special verdict before the court of King's Bench (in substance) states, that Livesey and Co. made a certain instrument in writing, directed to the defendants, requiring them, three months after date, to pay to John White or order 721l. 5s.; that Livesey and Co. at the time of making it well knew that no such person as J. White, in the bill mentioned, existed; that a certain indorsement in writing was afterwards made by Livesey and Co., purporting to be the indorsement of J. White, and requiring the contents of the bill to be paid to Livesey and Co., or their order; that Livesey and Co. afterwards indorsed (by A. Goodrich by procuration of Livesey and Co.) to the plaintiffs for a full and valuable consideration, when the plaintiffs became and still are the holders of the bill; that the defendants afterwards accepted, well knowing that no such person as J. White, in the bill named, existed, and that the name of J. White so indorsed thereon was not the hand-writing of any person of that name. That the defendants at the time of the making, and accepting the bill, had not, nor had they at any time since, any money, goods, or effects whatsoever, of or belonging to Livesey and Co. or of the plaintiffs, in their hands.

THIS special verdict being before the court of King's Bench in Mich. Term 30 Geo. III. the court gave judgment for the plaintiffs on the fifth count in the declaration. Upon this judgment, a writ of error was brought returnable in Parliament; and after arguments by counsel, the Lord Chancellor on the 26th April, 1790, referred to the twelve judges the three following questions.—First, Whether the making the instrument declared upon appears upon the special verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such an instrument?—Second, Whether upon the matter found in the special verdict the bill mentioned in the fifth count can be deemed in law a bill payable to bearer?—Third, Whether the matter of the special verdict will sustain any other count in the declaration?

ON the 3d of February 1791, the judges attended in the House of Peers and delivered their respective opinions. And as

to the first question those of them who delivered their opinions agreed, that the matter found in the special verdict was sufficient to warrant them in saying, that the making the instrument declared upon, was not so criminal that the policy of the law would not suffer an action to be founded upon it.

HOTHAM, BARON, in delivering his opinion says, in answer to the first question, I am of opinion that no such criminality can be distinctly inferred from this verdict. To constitute that degree of criminality, the facts found must amount to this, that the parties have uttered the bill or have forged it with intent to defraud some person in particular.—He conceived that Gibson and Johnson having accepted the bill after Livesey and Co. had indorsed it, and knowing at the same time that although there was on the bill a fictitious indorsement, there was also a real one, the law will presume them to have given credit to that, and thereby to have accepted a good and valid bill. In this view he said, I consider them as liable to pay the bill.

PERRY, BARON, with respect to the first question says, the law, where a felony has been committed, will not permit the party injured to proceed against the offender in a civil suit, but for the sake of the public he must seek his remedy by a criminal prosecution, and the civil action shall merge in the felony. This is certainly so against the person who commits the felony. The main ingredient to constitute the crime of forgery is an intention to defraud; it must be so laid in the indictment and proved. In the case of *Wilkes* at Launceston, *Tuft's* case [in C. VII. § v. par. 6. 7.] and *Bolland's* case [in C. VII. § v. par. 4.] cited at the bar, there was a false representation made, a false name put upon the several bills in each case, and in all an intention to defraud particular persons was charged expressly and found. He concurred with the judgment of both the courts of King's Bench and Common Pleas, and his answer to the second question was, that upon the matter found in the special verdict the bill mentioned in the fifth count may be deemed in law a bill payable to bearer.

THOMPSON, BARON, and Gould, Justice, were of the same opinion with Hotham and Perry, Barons, on all the three questions; and as to the third question were of opinion that the matter found in the special verdict would support the first count in the declaration.

LORD CHIEF BARON EYRE, who next delivered his opinion, adverting to the first question concerning the criminality of the instrument observes, that (although the transaction stated in the special verdict appears to be of a very criminal nature, perhaps sufficient to have warranted a charge of forgery against both the drawers and acceptors of this bill, and also to have warranted the

the finding of all that is necessary to constitute the crime of forgery, in both) the crime does not appear upon this special verdict so constituted. There is no fraudulent intention found, which is of the essence of the crime; consequently, the question, whether the policy of the law would suffer an action to be founded upon the crime, does not arise. Upon this question there is no difference of opinion, and therefore his Lordship says, I forbear troubling the house with any particular discussion of it. He next adverted to the different counts in the declaration, and in his discussion said, we shall all agree, that if a man claims to be entitled to a bill of exchange drawn payable to a real payee or order, and has not an indorsement by the payee, he cannot count upon it as a bill of exchange, though he should have paid to that payee the full value of it, and though it were bargained, sold, assigned and conveyed to him, by every form of conveyance which courts of law and equity in this country have recognized. This policy has lately prevailed so authoritatively, that two juries under the direction of a noble and learned judge have established, as far as their verdict could establish, a title by indorsement from one of *the name of the payee*, who was *not the real payee* in whose favour the bill was drawn, but into the hands of whom the bill fell by some accident or negligence in the drawer [in C. IX. § 11. par. 1.]. Possibly as names are but designations of persons, and that bill was in fact not made payable to that person, these verdicts may not be acquiesced in, and the question as to that indorsement may be considered as not finally settled.—His Lordship, at the conclusion of his opinion, says, The answers to the second and third questions, which it is my duty to submit to your lordships, thinking as I do of the case, is, that upon the matter found in the special verdict, the bill mentioned in the fifth count cannot be deemed in law a bill payable to bearer; and that the matter of the special verdict will not sustain any other count in the declaration. The drawers of this declaration saw these difficulties in the title of the plaintiffs claiming to sue on a bill of exchange payable to John White, a fictitious payee, or order; and therefore in the fifth and sixth counts they made a bold attempt to manufacture the bill a-new. But they seem not to have made the best use of their materials. If they had declared upon a bill drawn by Livesey and Co. (the indorsers by procuration) payable to the plaintiffs or their order, they might have alledged that our books say that every indorsement is a new bill; and if that be so, this bill is a new bill, wherein the indorsers are drawers, and the indorsee the payee. But they have not chosen to take this ground. In the fifth count they say simply that the bill was drawn payable to bearer; in the sixth they say, that the bill was drawn payable to Mr. John White

or

or order, but that the payee was fictitious, and therefore the contents of the bill became payable to the bearer, according to the effect and meaning of it.—HEATH, JUSTICE, argued in a similar manner to the Chief Baron, and concurred with him in opinion.

THOSE arguments by the judges in delivering their opinions, of which we have here but a brief sketch, were in the house of peers on the 3d of February 1791, and are reported by Mr. H. Blackstone in his Reports of Mich. and Hil. Terms, 31 Geo. III. After the judges had delivered their opinions the house adjourned. On Monday February the 14th a debate took place, in which lords Kenyon, Loughborough, and Bathurst argued in favour of the judgment, and the lord chancellor against it.

LORD KENYON observed that the question was, whether upon this bill of exchange the plaintiffs had a right to recover.—A title to this bill could not be deduced conformable to the words of the instrument, and in order to make out a title the indorsement of John White must be proved, which could not be done in this instance, because the special verdict had found that no such person existed. But melancholy indeed must be the case of many persons, if there were positive rules of law which said that no instrument could operate at all, unless it operated in the very terms in which it was written. His Lordship said, that after all the consideration he had been able to give this case, he was still of opinion that the judgment of the court of King's Bench ought to be affirmed.

THE LORD CHANCELLOR said, it was for the safety of mankind, that the forms of law should be observed, and that nothing should be assumed beyond what was expressly found by the special verdict. Though the evidence was ever so cogent, a court of law could not draw the conclusion, it must be done by a jury. The jury had found no fraud by their special verdict; and, consequently, the judges must say, there was nothing unfair in the transaction.—This was a melancholy case with respect to the parties. For, whatever became of this bill, with respect to the very next bill that came before the court, it must be decided whether this was, or was not a forgery: whether the putting the name of John White, or any other forged name upon a bill of exchange, was not matter within the statute. This was a thing he could have wished had been stated. This, therefore, must be found. It must be known whether it was possible for those who call themselves merchants, to put fictitious names, or the names of any other persons on bills, and to write those names themselves.—The case of *Collis v. Emmet* in the Common Pleas went on the same point with this.—His lordship said, he entered
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tained doubts on this subject, and differed in opinion from those who thought the judgment might be maintained on the fifth count. He conceived it impossible it could be on the first count; and saw no ground on which it was possible to affirm it: if it was affirmed, their lordships ought not to forget the numerous inconveniencies that would attend the transactions of commercial men. Who was to know that John White was a mere fiction? When was this to be known?—When the holders come against the acceptors, they refuse payment and stand an action; and at last the holders are told that the instrument, which they took as a bill payable to order, was a bill payable to bearer.

LORD LOUGHBOROUGH said, the bill was accepted by Gibson and Johnson after it was indorsed by the drawers. From that instant it ceased to be a bill payable to the order of White, because the acceptors, at the time they put their acceptance to the bill, took White to be merely matter of form; and his lordship was of opinion, that in its proper and legal operation, and in the real and true state of the transaction between the parties, this was a bill which Gibson and Johnson undertook to pay to whoever should produce that bill to them with the indorsement of Livesey, Hargreave and Co. and to whoever had paid a valuable consideration to the drawers, and that the judgment of the Court of King's Bench ought to be affirmed.

LORD BATHURST said, he was now well satisfied that according to the state of the special verdict this had always been a bill payable to bearer. It was consistent with justice that the holders should recover the amount of the bill for which they had given a valuable consideration; and Gibson and Johnson having accepted this bill, it was not in their power now to say that they should not be bound. He therefore thought the judgment ought to be affirmed.

THE LORD CHANCELLOR at the conclusion of the debate put the question, whether the judgment of the court of King's Bench should be reversed; which passed in the negative without a division.

FROM this decision it may be perceived that, notwithstanding the most favorable construction has been put on those bills, the same assimilate very nearly with forgery; and whether drawing and negotiating bills in the manner above described is, or is not a forgery, still appears to hang in suspense; for on the principal question, "whether indorsing the name of a fictitious payee be, or be not, a forgery," there was no decision.—Since this decision was the case of *Lidiard v. Panter*, tried at the sittings after Trin. Term, 31 Geo. III. The action was brought to recover the sum of 200l. upon a promissory note drawn by the defendant in favor of the plaintiff. The defence was, that the note was

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given

given without any legal consideration. A bill drawn by Livezey and Co. dated at Manchester, and accepted by Gibson and Johnson for 935l. was discounted by the defendant at the request of the plaintiff, in payment for which the note in question was given among others. This bill was made payable to a *fictitious* person, purporting to be a Mr. Hole.

LORD KENYON said, that if the plaintiff *knew* the bill was payable to a fictitious person when he received it, he acted fraudulently to discount it, and consequently he could not recover the note of 200l.—Verdict was for the defendant.

IN a petition *ex parte* Clarke, in the matter of *Livezey, &c.* bankrupts, 1791. The petition was to be admitted a creditor, in respect of certain bills indorsed by the bankrupt to the petitioner. The bills were made to fictitious payees. But it was said, that circumstance was of no consequence against the indorser.—Lord Chancellor. It is clear, that, as against the indorser, it does not signify what the bill is. The indorsee may come against the indorser, though the bill is a mere nullity in other respects. It is the indorser's business to see what he can make of the bill, but he, by his indorsement, is certainly liable to the indorsee^x.

§ III. AS CONCERNING bills and notes which are held to be negotiable. 1. Negotiable notes are those within the intent of the statute 3 & 4 Ann. Promissory notes were formerly only considered by the common law as evidences of a debt, and not assignable or negotiable in their own nature; but it being found necessary to make use of this kind of credit, it was enacted by the statute 3 & 4 Ann. c. 9. (made perpetual by 7th Ann.) That all notes in writing that shall be made and signed by any person, or by the servant or agent, who is usually intrusted by such person to sign promissory notes, whereby such person shall promise to pay to another, or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to such person to whom the same is made payable: and every note made payable to any person, or his order, shall be assignable or indorsable over, and the person to whom such sum of money is by such note made payable, may maintain an action for the same, either against the person who signed such note, or against him that indorsed it, as in cases of inland bills of exchange; and in every such action the plaintiff shall recover his damages and costs.—But it is hereby enacted, that all and every such action shall be commenced, sued and brought, within such time as is appointed

^x 3 Bro. Cha. Rep. 238.

appointed for bringing of actions, pursuant to the statute 21 Ja. I. of limitations; mentioned hereafter in § IV. par. 9.

2. It is said there are no precise words required to be used either in a bill of exchange or promissory note^y; and as to the latter, if it is within the intent of the act, it is sufficient, though it does not follow the very words of the act. In the case of *Taylor v. Dobbins*, it was held sufficient if the note is drawn thus, "I A. B. promise to pay, &c." without being *subscribed* A. B. though the words of the statute are *signed* by such person^a. And in the case of *Ash v. Baron*, Trin. 6 Ann. it was adjudged, that a note wrote by the plaintiff, and subscribed by the defendant, is a note made and signed by the defendant within this act; for the signing or subscribing is the *lien*, and the writing or making is the mechanical part of it^b. And in the case of *Elliot v. Cooper*, signing by, *making a mark*, was held sufficient signing within the statute^c.

HENCE it is perceivable that the name of the person making the note, must be inserted in the body or subscribed at the bottom thereof; and every note must be written or otherwise signed by the person making it, or some one authorized by him for that purpose.

3. THAT a note may be negotiable it hath been held that the same must be payable to payee or *order*, or to *bearer*, as should a bill, whereof mention will be made in par. II. but it does not appear that it must import to have been given for value received^d; and it is held that a bill of exchange need not, as shewn in C. III. § I. par. 2.

BUT that it may be negotiable it must be for the payment of money only, and that not on an uncertain contingency, as shewn in § II. par. 1. 2. Yet where the note is to become payable on an event which will certainly happen, though it be to take effect in future, it is negotiable, as in the case of *Cook v. Colehan*, 18 Geo. II. A note *to pay to A. or order, six weeks after the death of the defendant's father, for value received*, was held to be a negotiable note within the above mentioned statute; for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable so many days after sight. In Common Pleas it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice Willes^e.

4. AND so a note in its former part contingent, may by subsequent words become positive and negotiable; as if a note was drawn payable to an infant promising to pay *when he comes of age*, that

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would

^y Ld. Raym. 1397.

^a Str. 399.

^b 3 New Abr. 606.

^c Str. 609.

^d See hereafter, par. 6, 7.

^e Str. 1217.

would not be negotiable, on account of the uncertainty of the event; but when it is added, *on his coming of age, viz. 12th June 1750*, there the time is specified and it becomes a certain debt; as in the case of *Goss v. Nelson*, Hil. 30 Geo. II. judgment was obtained in an action upon a promissory note, given to an infant, payable *when he, (the infant) shall come of age, which will be June 12, 1750*; and the defendant's counsel having moved to arrest the judgment, for that this was not a good note within the statute 3 & 4 Anne, c. 9. which gives like remedy, upon promissory notes, as upon bills of exchange. In answer to which the counsel for the plaintiff cited the above mentioned case of *Cook v. Colehan*.

LORD MANSFIELD, chief justice: It would have been clearly good, if it had been made payable on the 12th June, 1750, that is to say, on a day certain, without mentioning the plaintiff's being then to come of age; and surely this is not the less certain, for *adding* that circumstance. The former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid; it is enough, if it be certainly at all events payable at that time, whether he lives till then, or dies in the interim. This is a good note within the remedial statute. A contingent note, where it is uncertain whether the money shall ever become payable at all, or not, is another case: such a note is not within the statute, and therefore I think this is a good note within the statute 3 & 4 Ann. c. 9. and the court being of the same opinion, they agreed that this was *debitum in presenti*, though *solvendum in futuro*, that is, a present debt, though to be paid in future^f.

THAT a note is negotiable, where it being to pay within two months after such a ship is paid off, was heretofore shewn in § II. par. 5. And in the case of *Lewis v. Orde*, 2d sittings in Middlesex, 8 Geo. II. an action was brought upon a note given by the plaintiff to the defendant in the following form: *I promise to pay Mr. James Lewis eleven pounds at the payment of the ship Devonshire, for value received*. The plaintiff declared as upon the statute of Queen Anne, taking it to be a note within the statute.—Marsh counsel for the defendant objects, that it is not a note within the statute; 1st, because not payable to order, or bearer; and, 2dly, because of the contingency of the time of payment.

HARDWICKE chief justice. It has been long settled, that the statute does not require a particular certain form, and said he remembered a case in this court where it was held on demurrer, that a note to be within the statute needed not to be payable to order.

order. And in that case it was urged, that it might as well be said every note within the statute should be payable *to order or bearer*; for they are the very words of the statute. As to the contingency of the payment, the subsequent act of the payment of the ship makes it certain; and therefore though not a lien *ab initio*, [a lien from the beginning] yet became sufficiently so, and within the statute by the fact happening after. It is not like the case of *Jocelyn v. Laferre*, [in § II. par. 7.] where it was held that a bill of exchange, payable out of a particular fund for growing subsistence, was not within the statute. I think therefore the declaration is proper enough; but you may make your objection in arrest of judgment; for this will appear on the record^g.

5. THAT a note may be negotiable if within the meaning of the act, though it does not follow the very words of the act, we have a further demonstration in the following cases. As in *Norris v. Lee*, Easter 11 Geo. I. it was held that a note drawn in these words, *I promise to account with J. S. or his order, for 50l. value received, by me, &c.* was a good negotiable note within this statute, and that the word *account* shall be construed the same as to *pay*, and not to render an account as factor or bailiff; and the rather, because he is not only accountable to J. S. but likewise to his order; which he cannot be as factor or bailiff, and therefore it must be to pay the money to the indorsee, or order of J. S.^h

6. AND in *Popplewell v. Wilson*, 6 Geo. I. where a promissory note was entered into by A. to pay so much to B. for a debt due from C. to the said B; and it was objected, that this not being for value received, was not within the statute, and *prima facie* the debt of another is no consideration to raise a promise. But the court held it to be within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value receivedⁱ.

7. IN *Chadwick v. Allen*. The following was held to be a note within the statute. "I acknowledge that Sir Andrew Chadwick had delivered to me all the bonds and notes, for which 400l. were paid on account of Colonel Synge, and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10l. which 10l. and 15l. 5s. balance due to Sir Andrew, I am still indebted and do promise to pay^k."

8. AND in *Burchell v. Slocock*, Mich. 2 Geo. I. where the note was, "*I promise to pay to W. 100l. in three months after date, value received of the premises in Rosemary-Lane, late in the possession of T. R.*" Upon a demurrer, the court held this clearly a promissory note within the statute 3 & 4 Anne^l.

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9. BILLS

^g Cunningham's Law of Bills, 113.
^k Str. 706.

^h Str. 629. ⁱ Str. 264.
^l Ld. Raym. 1545.

9. **BILLS** are not negotiable if payable out of particular and uncertain funds, or upon contingent or uncertain events, as heretofore mentioned in § II. par. 6. But where a particular fund is mentioned, and the mention thereof being as only by way of direction how the drawee shall reimburse himself, the bill is negotiable, as in the case of *Macleod v. Snee*, 13 Geo. I. where a writ of error being brought of a judgment in Common-Pleas, wherein the plaintiff declares, that A. B. drew a bill of exchange, dated 25th of May, whereby he requested the defendant one month after date to pay the plaintiff or order 9l. 10s. "as my quarterly half-pay, to be due from the 24th of June to the 27th of September next by advance." And the action was against the defendant on his acceptance. It was objected that this was no bill of exchange; because it is not to pay in all events, but is left to the pleasure of the person on whom it is drawn either to advance the money or not. And it was compared to the case of *Jocelyn v. Laferre*, [in § II. par. 7.] which was to pay out of his growing subsistence, and to the case of *Jenney v. Herle*, [in § II. par. 6.] which was to pay out of a particular fund, and in both cases held to be no bill of exchange. *But by the court*; The quarterly half-pay is a certain fund, which the growing subsistence was not: The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person. The reason it was held no bill of exchange in *Jenney v. Herle* was, because it was no more than a private order to a man's servant.—Hereon the judgment which had been obtained, and of which the above-mentioned writ of error was brought, was affirmed^m.

10. **THOUGH** it is said there are no precise words required to be used in a bill of exchange; and as to the form of the bill, that the same strictness and nicety are not required in penning of bills current between merchant and merchant, as in deeds, wills, &c.ⁿ. But as we have seen in § II. par. 6—11. a writing may have the resemblance of a bill of exchange and yet be otherwise; and in par. 11. That the instrument in writing which constitutes a good bill of exchange, according to the law, usage, and custom of merchants, is not confined to any certain form or set of words, yet it must have some essential qualities without which it is no bill of exchange; it must carry with it a *personal* and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*.

11. **AND** to a bill of exchange the name of the person making must be inserted in the body or subscribed at the bottom thereof; and it must be written or otherwise signed by the person making it,

or

^m Str. 762.ⁿ Id. Raym. 1397.

or some one authorized by him for that purpose°. And that it may be negotiable it seems that it should be payable to order, or to bearer^p.

§ IV. I. AS CONCERNING the nature and effects of bills of exchange and negotiable notes. A bill of exchange as well as a promissory note, ordained by statute 3 & 4 Anne, is a security, and differs from a bank note, which is as money itself; as shewn in C. IX. § VI. par. 1. But this security is not such as will prevail against the privilege of infants, or persons under twenty-one years of age, who are by law stiled infants till then^q, so as to bind them; wherefore if an infant draw a bill of exchange, infancy is a good plea *in bar* to an action brought against him^r. Yet by a late case, wherein are cited a variety of cases on the subject of infants incapability of securing payment, it seems that an infant may bind himself by a promissory note given for necessities^s.—As the above-mentioned security will not prevail against the privilege of infants, so neither will it against the general rule of law concerning married women; as that they can have no property either real or personal; yet in divers instances a wife may contract and be sued as a *feme sole* or unmarried woman, as shewn in C. VI. § VII. par. 1.—The security by a bill of exchange or a promissory note, is such as that an action may be brought thereon, or the holder may use either as evidence in another action. A bill is evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both consequently of money had and received by the drawer or maker to the use of the holder^t.

In cases of mutual debts and credit, bills and notes may be set off in an action brought against the holder, or against the claim of assignees under a statute of bankruptcy^u. And mutual credit may be thereby constituted, though the parties do not mean particularly to trust each other; as where a bill of exchange accepted by A. get into the hands of B. and B. buy goods of A. there is mutual credit between A. and B. though A. do not know the bill is in B's hands^w.

If a merchant abroad, or a gentleman who is no trader, draw a bill of exchange on a merchant here, or *vice versa*, requesting him to pay a sum of money, and the drawer sets his name to it, this amounts to a promise to pay^x; and as by the express contract

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° Str. 399. Ld. Raym. 1376. 1542.

^p Salk. 133. and see heretofore, § II. par. 9. and hereafter, C. VI. §. v.

^q Law's Disposal, 138, 139.

^r Carthew, 160.

^s *Truman v. Hurst*, Mich.

^t 26 Geo. III. 1 *Duraf. and East*, Rep. 40.

^u 12 Mod. 380. See *Grant v. Vaughan*, hereafter in C. VI. § v.

^w *Trader's and Conveyancer's Guide* and *Guard*, C. I. C. II.

^x *Ibid.* C. II.

^y *Cro. Jac.* 306. *Cro. Car.* 301.

tract of the drawer, the payee of a promissory note has clearly a property vested in him, so has the payee of a bill of exchange by the implied contract of the drawer, *viz.* that provided the drawee does not pay the bill, he will: for which reason it is usual, in bills of exchange, to express that the value thereof hath been received by the drawer; in order to shew the consideration upon which the implied contract of re-payment arises. By this implied contract the drawer, in case acceptance be refused, is liable to an action upon the bill, although the time of payment is not come; as shewn in C. IV. § IX.

2. BUT as to this property which although vested, yet it is not in possession, but in action, and termed in law a *chose in action*, being a thing rather *in potentia*, or in power, than *in esse*, or in being: though the owner may have as absolute a property in, and be as well entitled to, things in action, as to things in possession; for with respect to bills and notes, as well as bonds and contracts of divers kinds, also termed choses in action, the law gives an action to the party injured in case of non-performance, to compel the wrong-doer to do justice; and in actions arising *ex contractu*, by breach of promise, and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators, being indeed rather actions against the property, than the person, in which the executors or administrators have now the same interest that the testator or intestate had before^y. And with respect to the express contract of the drawer of a promissory note, or the implied contract of the drawer of a bill of exchange, who dies before it be fulfilled, the same must be answered by his executors or administrators, if there be assets, of which we shall again make mention in our ninth paragraph, towards the conclusion of this section; and in the third section of our fifth chapter treat on what is to be done with respect to demand and protest, in case the drawee of a bill of exchange dies after acceptance, or if he to whom the bill is to be paid dies; and in the seventh section of our sixth chapter, on indorsement by executors and administrators.

3. AND now proceed with mentioning, that by the general rule of the common law, no *chose in action* is assignable; and when a debt or bond is assigned over, it must nevertheless be sued for in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee; but the vested property in bills of exchange and negotiable promissory notes,

^y Law's Disposal, 22.

notes, may be transferred and assigned from the payee to any other man, contrary to this rule; which leads us to touch upon indorsements, by which the drawer may be charged with the payment of the debt to other persons than those originally contracted with, as that the payee or person to whom, or whose order, a bill of exchange or promissory note is payable, and where the sum therein expressed amounts to 5l. or upwards, may by indorsement, or writing his name on the back of it, as is the general method, and is commonly termed a blank indorsement, or by particularly directing it to be paid to the bearer, or another person by name, which is commonly termed a full indorsement, assign over his whole property; and the person to whom it is thus assigned is then called the indorsee; and he may assign the same to another, and so on *in infinitum*, as shewn in our sixth chapter.

4. IN case of a bill of exchange payable after sight, the time for payment whereof is reckoned from the day next ensuing the date of the acceptance, as shewn in C. III. § 1. par. 3. the same should be presented for acceptance without delay; though the precise time in which presentment must be made does not appear in any case to be ascertained. However, what is mentioned in C. III. § III. par. 1. concerning drafts payable on demand, seems to apply with respect to those bills, and from whence it may be construed there should be no delay in making presentment for acceptance.—In case of a bill payable after date, the payee ought, or the indorsee (if it be indorsed) might present the same for acceptance; but as to the time when it should be presented, or whether even the payee is obliged to present it for acceptance, or wait till it becomes payable, does not appear determined by any judicial determination; but that the indorsee is not obliged to present it for acceptance is clearly determined, as shewn in C. VIII. § VI. and that if he does, and acceptance be refused, he must give immediate notice to the antecedent party. The acceptance (so as to charge the drawer with costs) must be in writing under or on the back of the bill. If the drawee accepts it either verbally or in writing, (concerning which we shall treat in our fourth chapter) he makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment.—If acceptance be refused, an action will lie upon the bill against the drawer, though the time of payment is not come, as before hinted.

5. IF the drawee refuses to accept the bill, according to its tenor, and the same be an inland bill of the value of 20l. or upwards, made payable after date, and expressed to be for value received, or if it be a foreign bill, the payee or indorsee may
protest

protest it for non-acceptance; which protest must be made in writing under a copy of the bill, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant, in the presence of two credible witnesses: and notice of such protest must be given, or the protest itself in case of a foreign bill, sent to the drawer, or indorser, of which we shall particularly treat in different parts of our fifth chapter.

6. IN case the bill be accepted by the drawee in writing, and after acceptance he fails or refuses to pay it, within three days after it becomes due, (which three days are called days of grace, and are treated on in the first section of our ensuing chapter) the payee or indorsee is then to get it protested for *non-payment*, in the same manner and by the same persons who are to protest it in case of non-acceptance; and such protest, in case of an inland bill, must be notified to the drawer, or if it be a foreign bill, the same with the protest must be sent to him; and he, on producing such protest either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which by the rules of the common law he is bound to do within a reasonable time after non-payment, without any protest) but also interest and all charges, to be computed from the time of making such protest. If no protest be made or notified to the drawer, and any damage accrue by such neglect, it will fall on the holder of the bill, which when refused must be demanded of the drawer as soon as conveniently may be. Concerning which we shall treat in our fifth chapter, and there attend to some difference which now subsists between foreign and inland bills as to those particulars.

HENCE it may be observed, that although when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuse either to accept or pay; yet it is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; otherwise the law will imply it paid: as it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and drawee.

7. IN case the bill be indorsed, and the indorsee, or the person to whom it is indorsed, cannot get the drawee to discharge it, he may call upon either the drawer or indorser; or if the bill has been negotiated through many hands, upon any of the indorsers; as each is a warrantor of the payment thereof, the same being frequently taken as much (if not more) upon the credit of the indorser, as of the drawer; and if the indorser, so called upon, has the names of one or more indorsers prior to his
own,

own, to each of whom he is properly an indorsee, he may also call upon any of them to make him satisfaction; and so upwards: but in this case the first indorser can resort to no one besides the drawer; which will be more fully demonstrated in our ninth chapter, the principal subjects whereof will be on suing the parties; and now we shall proceed to a conclusion of those outlines by making a few more brief observations.

8. As that what has been here said concerning bills of exchange that are indorsed over, and negotiated from one hand to another, it may be observed, is applicable also to promissory notes; only that the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing; and in this case, as there is no drawee, there can be no protest for non-acceptance: but in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange against the prior indorsers, of which more particular mention will be made in the second section of our eighth chapter.

9. AND as we have in the former part of this section mentioned that those bills and notes are securities, here it may be observed, that the same are not of so high a nature as bonds or specialties, but are simple contract debts; and being within the statute 21 Ja. I. c. 16. commonly called the statute of limitations, no action can be brought for money due thereon after six years from the time the same became due; unless it be under particular circumstances, which are exceptions in the act; as with respect to infants, persons beyond sea, and some others; or unless the debt hath been revived by the debtor's acknowledging the same, and promising payment thereof within the six years².—If there are several drawers of a joint and several promissory note, the acknowledgment of one of them takes it out of the statute of limitations, as against the others, and may be given in evidence on a separate action against any of the others^a.—Of interest payable on notes of hand and bills of exchange, mention will be made in C. III. § VI. par. 1.

AND here we may again observe, as with respect to those bills and notes being simple contract debts, that the same are the last class of which an executor or administrator is to pay in course of administration^b; and if he pays them before debts of a higher degree, he must pay the latter out of his own estate, where there is a deficiency of assets^c. Likewise, in case of death, where there are *bona notabilia*, or goods to the value of 5l. in two

² Law's Disposal, 232, 7 Edit.

^a *Whitcomb v. Whiting*, Easter,

20 Geo. III. Doug. Rep. 652.

² Edit. See C. III. § VI. par. 5. No. III. n.

^b Law's Disposal, 57.

^c *Ibid.* 51.

two bishops' dioceses, whereby administration or probate must be taken before the metropolitan, debts owing to the intestate by bond or other specialties, are *bona notabilia* in the diocese where the bond or specialties be, and not where the debtor inhabits; but if the debts be only by simple contract, then they are to be esteemed *bona notabilia* in the place where the debtor is; as a bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is^d.

CHAPTER III.

Of Inland and Foreign Bills, and Promissory Notes. Drawing them; by whom and how the same should be drawn. The Times when they are to be paid. Drafts on Bankers. The Bank of England. Bankers, and Cash Notes. What may render Bills or Notes void or voidable.

HAVING concluded our preceding chapter with briefly treating on the nature and effects of bills of exchange and negotiable notes, we shall here treat on various other matters pertaining thereto, progressively enlarging upon divers points that have lightly been touched on; and in our first section treat on inland bills of exchange; by whom and how the same should be drawn; times wherein they are to be paid, and lay down the usual forms thereof with remarks thereon; and as in some respects inland and foreign bills differ, we shall treat on the latter in § II. In § III. on drafts on bankers, the bank of England, bankers, and cash notes. In § IV. on what may render bills or notes void or voidable. In § V. on the effect of notes payable to bearer. In § VI. attend to interest on notes and bills, what may be a negotiable note and what is indisputably so, and lay down the usual forms of notes. So that from the subjects of this chapter a conspicuous view may be had of such bills and notes as may with safety be discounted, or taken in the course of trade, and the holder enabled to sue acceptor, drawer, and indorser; attention being had to the responsibility of the acceptor, drawer, and indorser of a bill of exchange, and the maker and indorser of a promissory note; that the same be properly indorsed; that the negotiability thereof be not restrained by the indorsement, concerning which we have treated in C. VI. § II. and in the fourth and following sections of C. VII. on the effect of bills being lost, stolen, or forged.

§ I. AS

^d Law's Disposal, 6,

§ I. AS CONCERNING by whom bills of exchange should be drawn. 1. No person can regularly draw a bill for another in his absence, unless properly authorized by letter of attorney or otherwise; notwithstanding which, it is commonly practised by clerks, &c. and if it can be proved, that a merchant hath frequently paid bills of their acceptance, they will be recoverable by law; of which further mention will be made hereafter, and here we shall proceed to relate what Beawes says on this head; which is, That exchange is made in the name, and for the account of a third person when any one acts therein by the order, full power, and authority of another, which is commonly termed *procuracion*; and these bills may be drawn, subscribed, indorsed, accepted, and negotiated, not in the name or for the account of the manager or transactor of any branches of remittances, but in the name and for the account of the person who authorized him.

AND as such an unlimited power if abused may be of the most fatal consequence to the giver of it, who certainly puts his welfare and fortune in his procurator's hands, it ought not lightly to be granted, nor till the most sedate reflections and thorough knowledge of the person will justify the step, and bring it within the limits of prudence; therefore a discreet man will not hazard his substance by such a substitution, except through mere necessity, and then will act with all the circumspection possible in his choice; and when he has passed his nomination, and authentically substituted his agent, he must advise those correspondents on whom his procurator may occasionally want to draw, &c. with his having given such a power, and desire them to honour the firm of his substitute, whenever made use of for his account.

AND he that by such a procuracion does either negotiate, draw, indorse, subscribe, or accept bills of exchange, by subscribing his own name and quality (that is the attorney of his employer) does thereby as effectually oblige his principal as if he himself affirmed, whilst the procurator is not in the least obligated; but if any one, under the pretence of having a full power from a person of credit, transacts any business for his own account, he is not only obliged to perform all that he has negotiated in the name of another person, but is likewise liable to be punished severely for the deceit; and such a pretence no way obliges the person whose name is made use of therein.

It will therefore be prudent in every remitter or possessor of bills to refuse any drawings or acceptance by the wife, servant, &c. of those they pretend to represent, unless they first produce the power they say they act under, and this be in every respect full and satisfactory, and neither antiquated, recalled, or cancelled; and it is asserted by Marius and others, that a merchant's

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§ I. AS

letter to his wife, friend, servant, or any other, to accept bills of exchange, is not sufficient without a power of attorney in form; though if there should be no such instrument made to either of the aforementioned persons, yet if either of them have formerly in the principal's absence usually accepted his bills, and he approved thereof at his return, I believe on proof of this, it would always be construed as his intention, and be as valid and binding as a legal and formal instrument^a. Concerning which, see more in C. IV. § IX. par. 1, 2.

2. As to how inland bills of exchange should be drawn, it is observable, that the same are usually drawn payable at such times as the drawer and payee agree on, which may be on a certain fixed and appointed day; though are most commonly drawn payable so many days, weeks, or months after date, or so many days after sight, or at sight. The same must be made payable certainly, as shewn in the second section of our preceding chapter. And to entitle the holder to the benefit of a protest, value received must be expressed in the bill, and the same must be for 20l. or upwards, and made payable after date. In different cases it has been adjudged, that a bill or note, to be negotiable, must import to have been for value received, though in other cases it has been held otherwise, as shewn in C. II. § II. par. 9, 10. and that it need not is now fully settled^b. Yet it is different with respect to foreign bills, as shewn hereafter in § II. par. 5.—It is said (2 Ld. Raym. 139.) there are no precise words required to be used in a bill of exchange; but it is perceivable by what is related in C. II. § II. § III. that a writing may have the resemblance of a bill of exchange, and yet be otherwise; and from thence, and what is here mentioned, may be perceived what qualities are requisite to constitute a good bill of exchange; and which, notwithstanding it may be deficient in some of the particulars recommended by Mr. Beawes, and the forms hereafter laid down, the same may be a good bill of exchange. By Mr. Beawes: a drawer ought to observe before he subscribes a bill, and a remitter before he sends it away, that it be well and truly made, with all the necessary requisites fully expressed in it, which I shall here hint for their government; and 1st. It ought to have its date rightly and clearly expressed. 2dly, That it names the place where it was made and concluded on. 3dly, That the sum be expressed so distinctly, both in words and figures, that no exceptions can be taken against it. 4thly, That the payment be ordered and recommended. 5thly, That the time of payment be not dubiously expressed, nor sooner or later than has been agreed on. 6thly, The remitter must especially

^a Beawes's *Lex Mercatoria*, 462.

^b *White v Ledwick*, K. B. Hil. 25 Ge. III. Bailey, 5.

especially observe, that the name of the person to whom payment is to be made, be well and truly spelled; or if it be made to his order, that these words be clearly written. 7thly, and 8thly, He must also observe if his name be therein, and the value of him be expressed. 9thly, He must observe that the bill be subscribed by the drawer. 10thly, The drawer must principally look to the direction of the bill, that it be true and directed to the right person^c.

3. WITH respect to the times wherein inland bills of exchange are to be paid. If a bill be drawn payable some days after date or sight, the time must be computed from the day next ensuing the date of the bill, or the date of acceptance (if payable after sight). Thus on a bill payable ten days after date, dated the first of March, the time does not expire until the 11th. If the bill be drawn payable some weeks after date or sight, the weeks must be reduced into days, counting seven to the week, the first whereof commences on the day next ensuing the date of the bill, or the date of acceptance (if payable after sight). If drawn payable one or two months after sight or date, then the day of payment falls on the same day in the succeeding month, &c. from that in which the bill was presented and dated for acceptance, or dated by the drawer, although the months differ in the number of their days. Thus, where a bill is dated by the drawer the 7th of *January*, and drawn payable a month after date, the same is payable the 7th of *February* (not the 8th); as where the time is limited by months it is to be computed by calendar not lunar months. For paying those bills three days (called days of grace) are allowed after the time mentioned for payment; but if the same are made payable at sight, they are to be satisfied without any days of grace to be allowed. If made payable some days, or even but one day after sight, their acceptance is dated on the day they are presented; and on the day next ensuing the date of the acceptance commences the days of their running, and the acceptor has the three days grace.—If a bill be dated the *last* day of a month there is a difference as to the time of its becoming due, from the manner in which that last day is expressed, on account of the inequality of the length of the months. A bill made payable a month after date from the 28th of February, falls due on the 28th of March; but if it be dated *ultima* Feb. then it is not due till the *ultima* March, and the same in June and July, as the one hath thirty, and the other thirty-one days^d. With respect to foreign bills, for reckoning the precise time of a bill's payment (made payable after date) attention must be had to the difference between the old and new style, as will be shewn in the ensuing section.

4. PREVIOUS

^c *Lex Mercatoria*, 451.^d *Bedwies*, 484.

4. PREVIOUS to laying down the usual forms of those bills, we may just hint, that if a bill should not be drawn exactly to the usual and common form, it may have the effect of a bill of exchange, provided it hath the qualities above alluded to in par. 2, as requisite to constitute a good bill of exchange.

THE forms here proposed to be laid down are as follows:

No. I.

No. 5.^a 30*l*.

BRISTOL, 6th March, 1791.

At fifteen Days sight, pay to Mr. *Andrew Beale*, or Order, *Thirty Pounds*, Value received, and place the same to account, as *per advice*^c, [or without further advice] from
6d. ^bSt. *Charles Denison*.

To Mr. Edward Field,
Banker, LONDON.

9th March, 1791.

Accepted, E. F.

Indorsement.

Andrew Beale.^d

N. B. The above form, as likewise the following, may be begun with "*Sir*," when only one drawee, or, "*Sirs*," if two or more, and the words, "*Your humble Servant*," be inserted at the bottom, as in a letter.

No. II.

50*l*.

LONDON, 7th January, 1791.

Three Weeks after Date pay to Messrs. *George and Henry Harvey*, or Order, *Fifty Pounds*, Value received, and place
9d. St. the same to account, [as in No. I.] from

To Messrs. Lazarus and Matthew
Newcomb, Merchants, BRISTOL.

James Kemp.Accepted^g, L. M.

Indorsement.

George Harvey.^h

No. III.

^a When the drawer draws a bill or draft on a banker, or person on whom he frequently draws, the same is usually numbered.

^b Where the sum drawn for is above 2*l*. and not exceeding 30*l*. the duty is 6*d*. as shewn in the second section of our first chapter.

^c When a bill is drawn, the drawee is generally advised thereof by a letter from the drawer, in which case the words "*per advice*" are inserted, and if no advice is given, then the words "*without further advice*."

^d This is the general method of indorsement, made on the back of a bill, and is commonly termed a blank indorsement, and in C. VI. § 1. is shewn to be the most safe and proper.

^g Where a bill is drawn on two, both ought to subscribe the acceptance, unless they are partners, as then the acceptance of one binds both; as shewn in C. IV. § XI.

^h Where there are two payees who are not in partnership, both should indorse; as shewn in C. VI. § VII.

No. III.

100*l*.

BIRMINGHAM, 7th February, 1791.

Three Months after Date, pay to Messrs. *Den, Fen, and Co.* or Order, *One Hundred Pounds*, Value received,
 1*s.* St. *Doe and Co.*

To Messrs. Miles and Stiles,
 Merchants, LONDON.

Acceptance and Indorsement similar to what is above mentioned in No. II. n.

No. IV.

200*l*.

MANCHESTER, June 4, 1791.

Thirty Days after Date pay to the Order of Mr. *Abraham Bond*¹, *Two Hundred Pounds*, Value received,
 1*s.* 6*d.* St. For Comins, Down, and Evans,

To Messrs. Edward Founder and *Francis Comins.*
 Son, Bankers, LONDON.

Accepted, *E. F.*

Indorsement [as in No. I.]

No. V.

201*l*^m.

EXETER, 7th January, 1791.

One Month after Date pay to meⁿ, or my Order, *Two Hundred and One Pounds*, Value received by
 2*s.* St. *Philip Rowe.*

To Mr. Samuel Trueman, Linen-
 draper, EXETER.

Accepted, *S. T.*

Indorsement [as in No. I.]

§ II. I. FOREIGN BILLS differ from inland as to their times of payment and in some other respects, notwithstanding it appears to have been the professed intention of the statutes of Will. and Ann. to put them on the same footing; of which further mention will be made in C. V. § 1. par. 5. As to their times of payment they differ in three respects, First, when drawn in the forms heretofore laid down, and made payable after date

¹ On this bill A. B. may bring an action averring he made no order, or he may state the bill in his declaration as made payable to himself, or in the very words of it, as shewn in C. IX. § 1. latter part of par. 2.

^m If the sum drawn for exceed 20*l.* the duty is 2*s.* but no more for any sum above 20*l.*

ⁿ Though regularly there ought to be three persons concerned in a bill of exchange, yet there may be only two; and when the bill is accepted, credit is given thereto, so far as to make the acceptor liable, and to trust for a repayment to his correspondent. Law of Nisi Prius, 269.

in a country where the stile varies from that in which drawn. 2dly, as when drawn at usance. 3dly, as to the days of grace; of which particulars we shall proceed to treat, and for the information of such of our readers as may be unacquainted with the reason of the difference between the old and new stile, proceed with a brief definition thereof; as that Julius Cæsar, desirous of rectifying the erroneous computation of time that had prevailed till then, undertook the reformation; and as the year was corrected by him, the vernal equinox, (which reduced day and night to an equal length all over the globe, except just under the pole) happening in 325 to fall on the 21st of March; and from this the Nicene council (being then sitting) regulated the terms for Easter's observance. But Pope Gregory XIII. observing in the year 1582, that the equinox was changed from the 21st to the 11th of March, ordered ten days to be deducted from the calendar, and the 11th to be counted the 21st; which edict was generally observed by the nations acknowledging the supremacy of the see of Rome, but did not obtain universally, as most of the protestant countries continued to reckon their time as formerly: and this gave rise to the different ways of computation that now obtain in Europe, distinguished by the Julian and Gregorian calendars; and since the time of Pope Gregory the equinox has changed a day, viz. from the 11th to the 10th of March, so that the difference between old and new stile is eleven days. Great Britain and Ireland adopted the new or Gregorian stile by act of parliament in the year 1752^a.—Hence obtain the denomination of old and new stile, which occasions eleven days difference between the one and the other, and the first day of any month according to the *old* stile is the 12th according to the new.

THE places that observe the old stile are said by Beawes^b to be Russia, the electorate of Brandenburg, Denmark, East-Friezland, Hamburgh, and all Holstein; Lubeck, and all Mecklingburgh; Leipzick, Magdeburgh, Naumburgh, and all Saxony; Riga, Stockholm, and all Sweden; Strasburgh, &c.—The popish electorates and principalities of Germany observe the new stile, and the protestant ones continue the old.

THE following places observe the new stile, viz. London, Amsterdam, Dordrecht, Haerlem, Leyden, Rotterdam, and all the united provinces of Holland, as also Middleburgh, Ulffingen in Zealand, Antwerp, Bruges, Darnick, Gent, Ryffel, Brussels, Valenciennes, and all Brabant, Flanders, and Artois; Paris, and all France; Spain, Portugal, and all Italy; Augsburgh, Crembes, Lints, Vienna, and several places of the empire; Breslaw.

^a Beawes, 485.^b Ibid.

Bréslaw, and all Silesia; Colné, Dantzick, Königsberg, Thorne, and all Poland.

THUS having mentioned the places said to observe the old and new stile, we shall now advert to our position, as that foreign bills differ from inland as to their times of payment in three respects; as first, when drawn in the forms heretofore laid down, and made payable after date in a country where the stile varies from that in which drawn.—Upon a bill drawn at a place using one stile, and payable at a place using the other, if the time is to be reckoned from the date, it shall be computed according to the stile of the place at which it was drawn. If drawn payable after sight the time must be computed according to the stile of the place where it is payable. In the former case the date must be reduced or carried forward to the stile of the place where the bill is payable, and the time reckoned from thence. Thus on a bill dated the first of March old stile, and payable here one month after date, the time must be computed from the 19th of February new stile; and on a bill dated the 19th of February new stile, and payable at Petersburg one month after date, from the first of March old stile.——It is said that a bill payable at a certain day, is due on the day mentioned, according to the stile of the place it is drawn on, not where it is drawn from; so that a bill from Amsterdam, made payable at Hamburgh on the last day of November, is to be understood that day of old stile, and *vice versa* for a bill drawn in the same manner from Hamburgh to Amsterdam^c.—Where the time for payment of a bill is limited by months, it is to be computed by calendar not lunar months; and where it is limited by weeks or days, it is to be computed in like manner as hath been shewn with respect to inland bills in § I. par. 3.

2. WHEN a bill is drawn as may be at single, double, or treble usance, which is commonly at one, two, or three months, to be computed from the date of the bill, those usances vary according to the custom of the particular countries, and therefore it is necessary for the plaintiff, when an action is brought, to shew in his declaration what they are, else he cannot have judgment in his suit^d. As usance is commonly one month after the date of the bill; so double or treble usance is double or treble the time, and half usance half the time. Usance from London to any part of France is thirty days (this being declared to be a month in regard of exchanges in that kingdom) whether the month has more or fewer in it.

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^c Beawes, 484.

^d Law of Nisi Prius, 269. The manner of shewing what an usance is in the declaration, see in C. IX. § 1. par. 6.

FROM London to Hamburgh, Amsterdam, Rotterdam, Middleburgh, Antwerp, Brabant, Zealand, Flanders, and from those places to London, is one calendar month after the date of the bill.—From London to Spain, Portugal, and from those places to London, is two calendar months after date.

FROM London to Genoa, Leghorn, Milan, Venice, Rome, and from those places to London, is three months^c.

THE usance of Amsterdam upon Italy, Spain, and Portugal, is two months. Upon France, Flanders, Brabant, Geneva, Augsburgh, Cologne, Leipzick, and other places in Germany, upon Hamburgh and Breslaw, is fourteen days after sight, two usances twenty-eight, and half usance seven^f.

HALF usance, where the usance is one month, is fifteen days, notwithstanding the inequality of the months.

3. THE days of grace, or time allowed for payment of foreign bills, beyond the time mentioned therein, disagree in different nations. At London, Bergamo, and Vienna, three days are allowed; at Francfort (out of the fair-time) four; at Leipzick, Naumburgh, and Augsburgh, five; at Venice, Amsterdam, Rotterdam, Middleburgh, Antwerp, Colonge, Breslaw, and Nuremberg, six; at Naples, Denmark, and Norway, eight; at Dantzick, Koningsberg, and in France, ten; at Hamburgh and Sockholm, twelve; in Spain, fourteen; at Rome, fifteen; at Genoa, thirty. At Leghorn, Milan, and some other places in Italy, there is no fixed number of respite days. Sundays and other festivals are included in these days at London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburgh, Dantzick, Koningsberg, and in France; but not at Venice, Colonge, Breslaw, and Nuremberg. At Hamburgh, and in France, the day on which the bill falls due makes one of the days of grace, but no where else^g.

IN England, if the last of the three days happen on a Sunday, demand of payment is to be made on Saturday, as will be shewn in treating on protesting those bills in C. V. § II.

4. IN foreign bills, to promote dispatch, and to secure against miscarriages, and other accidents, a set of exchange is generally taken, that is, three or four bills of the same tenor and date, as in the forms hereafter laid down, each excepting against the others, which are remitted by different posts, ships, or other channels of conveyance; and when one of them is paid the others are of no force. And in an action on a second bill, it was held not necessary to aver in the declaration that the first and third were not paid^h.

5. FOREIGN

^c Beawes, 486.

^f *Ibid.*

^g Beawes, 486.

^h Carth. 510. See the form of declaring, in C. IX. § 1. par. 6.

5. FOREIGN BILLS usually specify the species in which payment is to be made, as in French money, Dutch money, &c. and the different kinds of value received for them; for though bills in England bear only value received in general, yet bills drawn in other countries usually particularize whether the value was given in money, goods, or bills. And in France not only "value received" must be inserted in bills of exchange, but also the nature of that value, in consequence of an ordinance of the king in March 1673, whether it was in money, merchandize, or other effects, to prevent several abuses which had crept into this branch of commerce, by the bare insertion only of "value received;" for it was common to give a note in payment of a bill of exchange, both expressing value received; and this method was found to be of great prejudice to trade, by occasioning many failures which the aforementioned arret was intended to prevent. And in consequence thereof there are four sorts of bills of exchange in that country, *viz.* the first expressing simply value received; the second, value received in merchandize; the third, value in himself, and the fourth value understood. The first and second need no paraphrase, being both alike in their negotiation, and their distinction only answering some ends that may occur between the drawer and the deliverer (in case of any failure or fraud). The third sort is when a merchant draws a bill of exchange on one who owes him money, which he sends to his friend or factor, to procure acceptance and payment; and as the acceptor is a creditor of his, an inconvenience might accrue to him should he insert value received, as his friend or factor might pretend that it belonged to him, appearing by the bill that the drawer had received the value. The fourth is, when a person taking a bill of exchange from one on whose credit he cannot rely, gives the drawer his acknowledgment of receiving the bill whose value he obliges himself to satisfy, on having advice that the bill is paid; but if the bill returns protested, it is again exchanged for the note, the drawer defraying the charges¹.

THE usual forms of those bills are as follows;

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No.

¹ Beawes, 490.

No. I.

London, 18th June, 1791.

Exchange for £.1,000^a Liv. Tournoises.

At fifteen days after date [or at usance, or two &c. usances], pay this my first of exchange, (my second and third of the same tenor and date not paid^b), to Mr. Charles Hendry or order, one thousand livres tournoises, value received of him, and place the same to account as per advice from

James Keeling,

*To Mr. Lewis Murfet,
Banker in PARIS,*

No. II.

London, July 14, 1791.

Exchange for £.500 sterl. at 35 Sc. 7 G. per £. sterl.

At usance pay this my first of exchange, (my second, &c.) [as in No. I.] to Messrs. Noah Oliver and Co. or order, five hundred pounds sterl. at thirty-five shillings and seven groats per pound sterling, value received of Mr. Philip Querens, and place it to account as per advice from

Robert Savory.

*To Mr. Thomas Uriel,
Merchant at AMSTERDAM.*

No. III.

London, August 6, 1791.

Exchange for 1,000 ster. pagodas.

At two ufo's and a half pay this my first of exchange, (my second, &c.) [as in No. I.] to Mr. Abraham Baker, or order one thousand pagodas sterling, value received, and place the same to account as per advice from

Charles Haldges.

*To John Kemp, Esq.
at MADRAS.*

§ III.

^a For each of those bills, where the sum drawn for shall not exceed 100l. the stamp duty is 6d. where it shall exceed 100l. and not 200l. 9d. where it shall exceed 200l. 1s. as shewn in C. I. § II.

^b In the second bill write (my first and third of the same tenor and date not paid). In the third (my first and second of the same tenor and date not paid).

§ III. DRAFTS on bankers. Bankers. The bank of England, and bankers' cash notes, being intended for the subjects of this section, we shall proceed with drafts on bankers, reserving the other particulars for our third and fourth paragraphs. 1. Those drafts are usually given by such persons as are not bankers when bills drawn on them and made payable after date or sight become due; and those who keep cash at a banker's, when they are in immediate want, commonly draw a draft payable as to A. B. [the payee] or bearer on demand, and if the residence of the person who draws the draft be within ten miles of the banker on whom drawn, no stamp is requisite, as shewn in C. I.

§ II. And as for making payments for the purchase of shares in the publick funds or stocks, as also on various other occasions, large drafts are frequently given upon bankers payable to bearer on demand; it is advisable to take the same to the bankers on whom drawn, without delay. So likewise as the payment of a bill of exchange is generally made by a draft on the banker of him from whom the bill is due, and in this case the holder of the bill delivers it up, perhaps with the indorsements of several persons of established reputation and property for the draft, or single security of the acceptor; it is advisable to take such draft to the banker's without delay, there being but a short time allowed for holding it in case of the banker's failure, as shewn in the ensuing paragraph. Yet another reason why it is advisable to take such draft to the banker's without delay is, the danger there may be of the draft being refused payment for want of effects, which has sometimes happened, and the holder resorting back to the acceptor to demand payment thereof, or the original bill to be delivered up to him, both have been refused, or the acceptor hath disappeared.—[Q. if the holder of the draft might not, under such circumstance, obtain a warrant from a justice of the peace for apprehending the acceptor; who by such proceeding seems to be punishable by the crown law, as may be perceived by the adjudged cases related in our seventh chapter, particularly that of Aicles in § IV. par. 2.]

2. It is the received opinion, and founded on the custom of merchants in the city of London, that drafts on bankers ought to be carried for payment on the very day they are received.

But in point of law, it has been lately said from the bench, that if a possessor of a draft on a banker does not keep it longer than twenty-four hours after he receives it, before he tenders it for payment, and within that time the banker stops payment, the drawer is obliged to pay the money.—The case was, The plaintiff took the defendant's draft on his bankers Brown and Collinson; the next morning they stopt payment, and the defendant refused to give cash for his draft, alledging, that if the plaintiff had presented it for payment as soon as possible after he received it, the bankers would have paid it. Earl Mansfield observed, that the whole rested upon custom; and the question to be determined was, whether the plaintiff was obliged to go to the bankers on the day he received the draft, for if he had, it appeared he would have been paid? His lordship said, it was unreasonable to suppose, that a tradesman should be compelled to run about town with half a dozen drafts, from Charing-Cross to Lombard-Street, and other places, on the same day. The jury were to consider that twenty-four hours was the usual time allowed, and the plaintiff kept it no longer from being paid, for the next morning the town was alarmed by the bankers stopping payment. The jury, however, found for the defendant^c; and the verdict was confirmed by the court of King's-Bench^d. And where a bill payable on demand was given to the plaintiff in London about one o'clock in the afternoon, and he delayed presenting it till the next morning, The question was whether this bill had been presented in proper time? Lord Mansfield having left it to the jury, they found for the defendant; and on a new trial granted, the jury again found for the defendant^e.

3. BANKERS, the denomination of whom was in England first given to some monied goldsmiths in the reign of King Charles the Second, as appears by the following paragraph in an act of parliament made the 22d and 23d of that prince's reign

viz,

^c *Metcalf v. Hall*, Sittings at Guildhall after Easter Term 1792, cited hereafter in C. VIII. § IV.

^d Beawes, 482.

^e *Appleton v. Sweetapple*, K. B. Mich. 23 Geo. III. For payment of money, bankers hours in and about London, are from 9 o'clock in the morning, till 5 in the afternoon.

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viz. Whereas several persons being goldsmiths and others by taking up or borrowing great sums of money and lending out the same again for extraordinary hire and profit, have gained and acquired to themselves the reputation and name of bankers, &c.—By charter from King William III. in consequence of an act of parliament passed in 5 W. & M. c. 20. and continued by several subsequent acts, the bank of England was established; the business of which as relating to the stocks we shall omit mentioning, and proceed with a brief description of the nature of the mercantile money transactions at the bank, which in most respects are similar to those of other bankers; as whoever has a mind to keep cash at the bank may give a specimen of his firm in a book kept for this purpose, and apply to the first clerk of these accounts (commonly called the drawing accounts) who will give him a book wherein his account is opened, which book he takes away with him; and whenever he has any cash to pay in he carries it to the bank with the book, in which he has credit immediately given for it; and on the contrary when he wants to pay, he draws the sum on one of the checks delivered him by one of the clerks at the bank on opening the account.—If the person thus opening account has any accepted bills payable in London, and has a mind the bank should receive them, he must indorse and carry them with his book to the bank and have them entered by the proper clerks, and after this deposit, the value will be carefully received, or the bills duly protested; if the former, their import will be credited in his account; if the latter, the bills will be returned, and the charges of protesting debited to him.—No body is obliged to pay a personal attendance for any transaction with the bank, but may send another with their book for entries, as most merchants do their clerks, and all possible dispatch is given to every one in their turn. The bank will discount bills for any sum, if the holders and acceptors are to the director's satisfaction; and besides discounting bills will advance monies on government securities or on a deposit of foreign specie or bullion, but never on jewels, or estates.—They will receive, by way of deposit, from any person keeping cash with them, bullion, foreign specie, jewels, or any such effects that are not bulky, and take care of them till called for.

BANKERS, the denomination of whom was in England first given to goldsmiths, as above-mentioned, their advantages arise from the same negotiations as those of the bank of England, only in a more limited degree; their shops are the depositories or receptacles of their customer's money, which is paid in and drawn out by the proprietors (as in the bank) at their pleasure; they

they will discount bills, and advance money on such securities as the bank does, and likewise on plate, jewels, title deeds of houses and lands, and other similar securities, such as the receipts for subscriptions to government loans, &c. when they are well acquainted with the owners.

4. CASH NOTES are now issued by those bankers, who of late years have been considerably increased, not only in London, but in every capital city and town in Great-Britain. Those notes are to be paid by the person, and at the place, by whom and where the same were first issued, unless stamped with a 6d. stamp where the sum made payable thereby shall not exceed 5l. 5s. and with a 1s. stamp where the sum shall exceed 5l. 5s. and not 30l. and if thus stamped the same may be paid to and re-issued by any person holding them, and any holder may maintain an action thereon; as shewn at large in C. I. § II.—The law concerning those notes is the same which obtained with respect to goldsmiths' notes. The notes of goldsmiths (whether they be payable to order or bearer) are always accounted among merchants as ready cash, and not as bills of exchange. The time of receiving money upon a goldsmith's note is immediately, or else it will be at the peril of him who pays the note. He who delivers over the note, will not be charged if the goldsmith fails, as the drawer of a bill of exchange would be; but the receiver is supposed to give credit to the goldsmith, and the note is looked upon as ready money payable immediately, and if he does not like it he ought to refuse it, but having accepted it, it is at his peril. But if the party to whom the note is delivered demands the money of the goldsmith in a *reasonable time*, and he will not pay it, it will charge him who gave the note. A goldsmith's note indorsed is a bill of exchange against the indorser^f.—What shall be construed a reasonable time for demanding the money on those notes has been a subject of much doubt, and the precise time in which it must be demanded still seems to be undetermined. However it may be perceived by what is above-mentioned in par. 2, concerning drafts on bankers payable on demand, which are upon the same footing with those notes, that there should be no delay in demanding the money, and that the same ought to be carried for payment on the very day on which they are received.

§ IV. CONCERNING what is and is not a negotiable note was largely treated on in C. II. § II. § III. and in our ensuing section we shall treat on the effect of notes payable to bearer, of receiving part from maker or indorser of a note; and here attend

^f Cunningham's Law of Bills, 124.

attend to the considerations on which bills or notes may have been obtained; as that if a bill or note be obtained for money won at play, or on a usurious contract, the same will be void even in the hands of an innocent indorsee, as shewn in C. VII. § II. where we have treated on the different cases in which a bill or note will be void in the hands of the payee, and all indorsees; the latter of whom hath remedy only against the indorsers, and neither the drawer or acceptor is compellable to payment thereof. So neither are they where a bill has been altered after acceptance, as in the case of *Master v. Miller*, in C. VII. § II. par. 9. But in other cases although the payment of a bill or note may be avoided if the same be obtained on such bad or illegal consideration, as is treated on in C. VII. § I. yet the consideration cannot be taken advantage of but in an action between the original parties (unless in the case of a bill or note negotiated after become due, treated on in C. VII. § II. par. 10.) a distinction being taken between an action between the parties themselves, and an action by or against a third person, viz. an indorsee or acceptor; as in *Collet and Griffiths*, Hil. 2 Geo. II. at Guildhall; in an action against the indorser, lord Raymond would not allow the defendant to give in evidence, that the plaintiff desired him to indorse the note to enable him to bring an action against the drawer. But where the action was by the payee against the drawer, the defendant was let in to shew it was delivered as an escrow, viz. as a reward in case he procured the defendant to be restored to an office, which it being proved he did not effect, there was a verdict for the defendant. The reason of this distinction, see in C. VII. § IV. latter part of par. 3.

WHEN a bill or note is transferred and passes into the hands of third persons who gave a valuable consideration for it, the transaction between the original parties cannot in an action be enquired into, unless in the cases above alluded to. Neither can any transferee who has received a consideration insist upon the want thereof.—In *Haly v. Lane*, 1741. By lord chancellor Hardwicke: Though a note given by a wife to a husband is void, yet, if indorsed over by the husband as between him and the indorsee, it is certainly good. In cases of like nature I have, at the sittings at *nisi prius*, directed a jury to find for an indorsee,

indorsee, notwithstanding the indorser had the note from an infant, the original drawer. Where there is a negotiable note, and it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him unless there should be some fraud or equity appearing against him in the case^h.—An indorser is bound by his indorsement, though the bill is made to a fictitious payee, or if the bill be a mere nullity in other respects. Petition was to be admitted a creditor, in respect of certain bills indorsed by a bankrupt to the petitioner. The bills were made payable to fictitious payees. But it was said, that circumstance was of no consequence against the indorser.—Lord chancellor, it is clear, that, as against the indorser, it does not signify what the bill is. The indorsee may come against the indorser though the bill is a mere nullity in other respects. It is the indorser's business to see what he can make of the bill; but he, by his indorsement, is certainly liable to the indorseeⁱ.—That an indorser writing an indorsement on a blank note, or check, may be bound for any sum and time of payment, which the person to whom he intrusts the note chooses to insert in it, will be seen hereafter in C. VI. § iv.

HAVING here attended to what is a bad or illegal consideration, we may now drop a few hints concerning what is a good consideration, without entering into a minute discussion thereof. As, that any valuable consideration, as for marriage, for money, for work done, or for other reciprocal contract, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other person^k. So a liability to pay money is a good consideration for a bill of exchange; as shewn in C. IX. § v. par. 4, 5, 6.

§ v. AS to the effect of notes payable to bearer, and of receiving part from maker or indorser of a note. 1. A note payable to bearer on demand is a cash note, the effect whereof hath heretofore been described in § III. par. 4. And where a cash note on a banker was made payable to the *ship Fortune or bearer*, the same was held to be a good and negotiable bill of exchange, and that the bearer might maintain an action on it in his own name, or recover on it in an action for money had and received to his use, as shewn in C. VI. § v. where the nature and effect of

^h 2 Atk. 181.

ⁱ *Ex parte Clarke*, in the matter of

Livesey, &c. bankrupts, 1791.

³ Bro. Cha. Rep. 238.

^k 2 Black. Com. 444.

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of those notes are fully demonstrated, and from whence may be perceived, that promissory notes payable to bearer, are equally transferrable as those payable to order, and that the transfer in both cases equally entitles the *bona fide* holder to a right of action, though the mode of transfer is different; notes payable to bearer are transferrable by delivery; the others by indorsement. But it has been held that a person making a transfer by delivery ceases to be a party to the note; that such a transfer is a sale, and that he who sells does not become a new security, and is not liable to refund the money if the note should not be paid; as where the defendant had a note of sixty pounds of one Bellamy, a goldsmith, payable to him or bearer at a day then to come; about a week before which he discounted it at the bank, without indorsing the bill. Bellamy about two months after broke, without having paid the bill; upon which the bank brought *assumpsit* for money lent, and upon this evidence obtained a verdict; but the court granted a new trial, holding it to be a verdict against law; for if the owner of a bill payable to bearer deliver it for ready money paid down for the same, and not for money antecedently due, or for money lent on the same bill, this is selling the bill like selling of tallies, bank bills, &c. but if there be an indorsement thereon, the indorsee may have remedy on that indorsement, provided he demand the money in a convenient time, and give due notice of non-payment by the drawer¹.—This was the opinion of the court. However the jury on a new trial found for the plaintiff^m. And we conceive that the opinion of the court in this case would not be held as law at this time, and that it cannot hold unless when applied to the case of a demand by a subsequent party, when several have intervened between him and the party against whom he made the demand, and not between the immediate parties to the transfer; and that though the person who has given the money for the note cannot recover against the person from whom he received it, as indorsee, yet he may recover in an action for money had and received to his use, provided he duly demanded the money of the maker of the note and gave due notice of non-payment.

And here it may be observed that a note payable to bearer is transferrable by delivery, and that any holder may demand payment thereof, and that when transferred by delivery the transferee may recover the consideration given for the same in an action against the next immediate transferrer; and if the same be indorsed the indorsee may have his action as indorsee against the indorser.

¹ *Bank of England v. Newman*, 11 W III. Law of Nisi Prius, 277. edit. 1785.

^m *Cunningham's Law of Bills*, 145.

indorsee, notwithstanding the indorser had the note from an infant, the original drawer. Where there is a negotiable note, and it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him unless there should be some fraud or equity appearing against him in the case^b.—An indorser is bound by his indorsement, though the bill is made to a fictitious payee, or if the bill be a mere nullity in other respects. Petition was to be admitted a creditor, in respect of certain bills indorsed by a bankrupt to the petitioner. The bills were made payable to fictitious payees. But it was said, that circumstance was of no consequence against the indorser.—Lord chancellor, it is clear, that, as against the indorser, it does not signify what the bill is. The indorsee may come against the indorser though the bill is a mere nullity in other respects. It is the indorser's business to see what he can make of the bill; but he, by his indorsement, is certainly liable to the indorsee^c.—That an indorser writing an indorsement on a blank note, or check, may be bound for any sum and time of payment, which the person to whom he intrusts the note chooses to insert in it, will be seen hereafter in C. VI. § iv.

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^b 2 Atk. 181.

^c *Ex parte Clarke*, in the matter of

Livesey, &c. bankrupts, 1791.

³ Bro. Cha. Rep. 238.

^k 2 Black. Com. 444.

¹ *Bank of England v. Jones*, Law

of those notes are fully demonstrated, and from whence may be perceived, that promissory notes payable to bearer, are equally transferrable as those payable to order, and that the transfer in both cases equally entitles the *bona fide* holder to a right of action, though the mode of transfer is different; notes payable to bearer are transferrable by delivery; the others by indorsement. But it has been held that a person making a transfer by delivery ceases to be a party to the note; that such a transfer is a sale, and that he who sells does not become a new security, and is not liable to refund the money if the note should not be paid; as where the defendant had a note of sixty pounds of one Bellamy, a goldsmith, payable to him or bearer at a day then to come; about a week before which he discounted it at the bank, without indorsing the bill. Bellamy about two months after broke, without having paid the bill; upon which the bank brought *assumpsit* for money lent, and upon this evidence obtained a verdict; but the court granted a new trial, holding it to be a verdict against law; for if the owner of a bill payable to bearer deliver it for ready money paid down for the same, and not for money antecedently due, or for money lent on the same bill, this is selling the bill like selling of tallies, bank bills, &c. but if there be an indorsement thereon, the indorsee may have remedy on that indorsement, provided he demand the money in a convenient time, and give due notice of non-payment by the drawer¹.—This was the opinion of the court. However the jury on a new trial found for the plaintiff^m. And we conceive that the opinion of the court in this case would not be held as law at this time, and that it cannot hold unless when applied to the case of a demand by a subsequent party, when several have intervened between him and the party against whom he made the demand; and not between the immediate parties to the transfer; and that though the person who has given the money for the note cannot recover against the person from whom he received it, as indorsee, yet he may recover in an action for money had and received to his use, provided he duly demanded the money of the maker of the note and gave due notice of non-payment.

And here it may be observed that a note payable to bearer is transferrable by delivery, and that any holder may demand payment thereof, and that when transferred by delivery the transferee may recover the consideration given for the same in an action against the next immediate transferrer; and if the same be indorsed the indorsee may have his action as indorsee against the indorser.

¹ *Bank of England v. Newman*, 11 W III. Law of Nisi Prius, 277. Edit. 1785.

^m *Cunningham's Law of Bills*, 145.

indorser. But in either case demand of payment must be made by the holder on the maker when the note becomes due, and due notice must be given in case of non-payment to the transferrer, otherwise he will be discharged.—If the note be made payable on demand it is a cash note as already mentioned, and no days of grace are allowed, otherwise it is if made payable at a day to come; as shewn hereafter in § VI. par. 3.—On holding notes, payable at a day to come, after being dishonoured, we have copiously treated in C. VIII. § IV. wherein is a demonstration of the effect of the holder's giving time to the drawer; what is held reasonable notice of non-payment.

2. CONCERNING receiving part from the maker or indorser of a note. The receiving part by an indorsee from the maker of a note, will be a discharge to the indorser, unless due notice be given of the non-payment of the residueⁿ, such receipt being construed to be giving of credit for the remainder; but if due notice be given that a note is not duly paid, the receiving part from the maker or an indorser, it is conceived, will not discharge the maker or other indorsers, no more than receiving part from the acceptor or indorser of a bill of exchange, mentioned in C. IV. § VII.

§ VI. 1. As to interest on notes of hand, it may be observed that debts due on those are not of so high a nature as bond debts, and that a note doth not like a bond carry interest from the date or execution thereof, whether interest is mentioned therein or not; but if interest is not mentioned in the note, then it is due only from the time appointed for payment of the note; and if no time is mentioned, and the note is made payable on demand, then from the time of the demand being made.—As the interest on a bill of exchange may depend on its being protested, we shall treat hereon in C. V. § I. par. 4., and here attend to negotiable notes.

2. As concerning what may be a negotiable note. If a note should not be methodically drawn it may be a negotiable note within the statute of 3 & 4 Ann. as is demonstrated in the second and third sections of our preceding chapter, from whence and what has heretofore been related in the preceding section, a just conception may be formed of what is, and is not, a negotiable note. And now, previous to laying down the forms of such as not only may be negotiable, but that are so indisputably good and negotiable as to be taken with safety in the course of trade,

ⁿ *Kallock v. Robinson*, 13 Geo. I. 2 Str. 745.

trade, attention being had to the responsibility of the maker and indorser thereof, and that the note was not obtained for money won at play or on a usurious contract, as heretofore treated on in § IV. We shall proceed to mention, that negotiable notes are most usually drawn payable so many days, weeks, or months after date, as the drawer and payee agreed on; and if made payable some days after date, the day of which the note was dated must be excluded. Thus on a note payable ten days after date, dated the 1st of March, the time does not expire until the 11th. If a note be made payable some weeks after date, the weeks must be reduced into days, counting seven as one week; and on the day next ensuing the date of the note, commences the time of its running. If it be made payable one or two months after date, the day of payment falls on the same day in the succeeding month from that in which the note was dated, although the months differ in the number of their days; for where the time, after the expiration of which a note is made payable, is limited by months, it must be computed by calendar, not lunar months. And here, according to practice, the three days grace have been allowed as on bills of exchange, where the note was drawn payable at a day to come or after date, and not on demand. Yet it was ruled by justice Denison that by law there are not three days grace on promissory notes^a; and till very lately it has been in doubt whether the three days grace were to be allowed on promissory notes as on bills of exchange; but now it is settled by a solemn decision of the court of King's bench, that the three days grace are to be allowed on promissory notes as well as on bills of exchange, and that the 3 & 4 Ann. c. 9. puts them both on the same footing in all respects^b.

5. The forms here proposed to be laid down are as follows :

No. I.

LONDON, 3d February, 1791.

Three Weeks after Date I promise to pay *Mr. Aaron Beauchamp, or Order, Thirty Pounds*, Value received,

6d. St.

30 £.

Charles Davis,

Hofier, in Fetter-lane^a.

Indorsement.

Aaron Beauchamp^b.

No.

^a *Dexlaux v. Hood*, 1752. Law of Nisi Prius, 274. ^b *Brown v. Harraden*, Hil. 31 Geo. III. 4 Durnf. and East, Rep. 148.

^a The maker's address to the note does not add to or diminish its validity, but is very necessary, in order to shew where he is to be found, as an indorsee is to demand the money of him before he sues the indorser.

^b This is the general method of indorsing on the back of a note, and is commonly termed a blank indorsement, and in C. VI. § 1. is shewn to be the most safe and proper indorsement.

No. II.

BRISTOL, 7th March, 1791.

Two Months after Date I promise to pay Mr. Edward
Funnerow, or Order, Fifty Pounds, Value received,
 9d. St. *George Hand,*
 50*£.* Linen-draper in Lewin's Mead.

Indorsement [as in No. I.]

No. III.

BATH, 29th May, 1791.

Three Months after Date *we jointly and severally* promise
 to pay Mr. Lazarus Mullett, or Order, One Hundred
 1s. St. Pounds, value received,
 100*£.*

Noah Olive.
Philip Querulus.
Robert Savory.

Indorsement [as in No. I.]

Where two or more persons give the note, attention should be had as to their promising jointly and severally; in which case the payee may sue them jointly, or he may sue any one of them at his election; but if they only jointly, and not jointly and severally promise, he must sue them jointly.—In *Rees v. Abbott*, 18 Geo III. where a note was by two promising to pay jointly or severally, and the action against one of them only, who let judgment go by default, and brought his writ of error. By Lord Mansfield, in delivering his opinion: or in this case is *synonymous* to *and*. They both promise that *they* or *one* of them shall pay. Then *both* and *each* is liable *in solidum*.—By Justice Buller: If the note had been a joint one, and defendant had been sued as if several, he could only have pleaded that matter in abatement, and not taken advantage of it in error. Cowp. 832.—The acknowledgment of one out of several drawers of a joint and several promissory note, takes it out of the statute of limitations against the others, and may be given in evidence on a separate action against any of the others. *Whitcombe, Whiting*, Easter 21 Geo. III. Doug. 652. 2 Edit.

CHAPTER. IV.

Of Acceptance and Acceptors.

WHEN the payee or indorsee of a bill presents it for acceptance, he is entitled, from the undertaking of the drawer or indorser, to expect an absolute acceptance by the drawee, or if there be several not connected in partnership by each, written by him or them personally upon the bill; and as any other may be refused, the holder of the bill should attend to what will amount to an acceptance in writing, and of this we shall treat in our first section. In § II. on subscribing an acceptance not intended to be general. In § III. on conditional acceptances. In § IV. on an acceptor being chargeable and discharged by conditional acceptances pursuant to the conditions, and his being bound by an absolute acceptance. In § V. shew that an acceptor cannot be discharged from an absolute acceptance without an express declaration from the holder. In § VI. that if payee receive part from the drawer, acceptor is not discharged thereby. In § VII. that if indorser accept part from acceptor he cannot afterwards resort to the drawer unless timely notice be given. In § VIII. treat on presenting a bill for and procuring acceptance thereof; on the acceptor's engagement and how he is discharged therefrom. In § IX. shew that if acceptance be refused an action will immediately lie against the drawer. In § X. that drawee may refuse acceptance, or accept the bill in part, and the effect of such acceptance. In § XI. treat on acceptance by partners; by a book-keeper or servant; acceptance and payment for honour.

§ I. I. ACCEPTANCE may be either by writing or words. If by the latter it is sufficient to charge the acceptor; but in order to charge the drawer with costs and damages the same must be in writing, of which further mention will presently be made. If upon tender of the bill to the drawee he subscribes *accepted*, or, *accepted by me A. B. or I accept the bill, and will pay it according to the contents*; these clearly amount to an acceptance in writing^a; and any writing by the drawee on the bill, though his name be omitted, which does not put a direct negative on its request, or express a refusal to accept, will amount to an acceptance; as "*accepted*," "*presented*," "*seen*"^b. So a direction to a third person to pay the bill was held a sufficient acceptance; as in the case of *Moor v. Whithy*. Trin. 10 Geo. III.

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A bill

^a Molloy, book 2. c. 10.^b Comb 401.

A bill was drawn as follows: "To Mr. R. Whithy, Sir, please to pay Mr. Scot, or order, 30l. Tho. Newton." Scot indorsed it to the plaintiff, who presented the bill to the drawee for acceptance, and the defendant (the drawee) underwrites thus:—"Mr. Jackson, please to pay this note, and charge it to Mr. Newton's account. R. Whithy." It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor. It was only a direction to Jackson, to pay 30l. out of a particular fund; and if there were no such fund, the money was not to be paid. But, *by the court*: The underwriting is a direction to Jackson to pay the sum; and it signifies not to what account it is to be placed when paid: that is a transaction between them two only; and this is clearly a sufficient acceptance^c.

A SMALL MATTER amounts to an acceptance, as saying, "Leave the bill with me, and I will accept it," for it is giving credit to the bill and hindering the protest; but if the merchant says, "Leave the bill with me and I will look over my accounts between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted." This is no acceptance, because it depends upon the balance of accounts^d.—The mere answer of a merchant, "that he would honour the bill," is no acceptance except accompanied with other circumstances, which may induce a third person to take it by indorsement^e. And where a request was made to A. to accept a bill, and to draw upon B. for the like sum, it was held that the mere act of drawing upon B. did not amount to an acceptance; as that what A. had done did not amount to an acceptance; for he never meant to make himself liable, unless the bill drawn upon B. was accepted and paid^f.—An agreement to accept may be equivalent to an acceptance, and that whether the agreement be verbal or in writing^g. And an agreement to accept will be binding before the bill has existence, as will be seen hereafter in § III. par. 2.

THAT the acceptance may be qualified, as to pay half in money, &c. and that such acceptance, and any other than is not to pay according to the tenor of the bill, may be refused will be shewn hereafter in par. 4. And in our ensuing section, that care should be taken in subscribing an acceptance not intended to pay according to the tenor of the bill. That acceptance may be conditional and only charge when the condition is performed. That whether it be absolute or conditional is matter of law. That payee at the time of tendering the bill must take it in one light or the other and abide by his election.

2. AND

^c Law of Nisi Prius, 270. Edit. 1785.

^d *Ibid.*

^e *Per* Lord Mansfield, Cowp. 573.

^f *Smith v. Nissen*, Trin. 26 Geo. III.
1 Durnf. & East, Rep. 269.

^g *Beaves*, 466.

2. AND here we shall proceed to shew that acceptance must be in writing to charge the drawer with damages and costs ; and that the same not being in writing does not discharge any remedy against the acceptor, which is demonstrated in the two following cases.

IN the case of *Lumley v. Palmer*, Mich. 8 Geo. II. The defendant was sued as acceptor of an inland bill of exchange, and upon the evidence it appeared to be a parol acceptance only, which the chief justice ruled to be sufficient, as being good at common law : and the statute 3 & 4 Ann. c. 9. which requires it to be in writing, in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. Upon this direction, the jury found for the plaintiff : but the chief justice of the common pleas having ruled it otherwise, the court was moved for a new trial, and in order finally to settle this point, it was ordered to be argued ; and after argument the court was of opinion, that the direction in the present cause was right, and agreeable to constant practice^h.

IN the case of *Powel and Monnier* in chancery, 10 Geo. II. before lord Hardwicke. A bill was for satisfaction of a bill of exchange, drawn upon the defendant, and accepted by him. Pending the suit, the original defendant died, and it was revived against his executors ; praying also a discovery of assets, and to be satisfied thereout. On the proofs it being questioned, whether the acceptance was sufficient to charge the defendant, and whether the plaintiff by keeping the note above ten days after it became due, without coming to the drawer for the money, had not discharged the acceptor ; but it was insisted for the defendant as a previous matter, that the plaintiff had a plain remedy at law and that his case depended on facts that ought to be tried by a jury, and not be determined in this court. By lord Hardwicke : Regularly the plaintiff ought to pursue his remedy at law, and not in this court ; and if the case stood as it did at first, I should certainly dismiss the bill ; but the bill of revivor, praying a satisfaction out of assets, and a discovery of assets, it is made a case of which this court takes cognizance, and then the prayer of satisfaction is an incident that follows with it. I have therefore no doubt but the plaintiff is proper in praying a remedy in this court. But with regard to the acceptance, if there were a doubt of it, as to the fact, or whether in law what has been done amounts to an acceptance, it may still be necessary to send the parties to a trial at law : but I think there is no doubt of either. The testator, when the bill was brought to him, received it, entered

tered it in his book, according to the course of trade, and the entry is proved to have been made under a particular number, and wrote that number under the bill, and returned it. Now it is said to be the custom of merchants, that if a man underwrite anything to a bill, it amounts to an acceptance. But if there were no more than this in the case, I should think it of little avail to charge the defendant; but what determines me is the testator's letters; and I think there can be no doubt but that an acceptance may be by letter, and it has been so determined. There was a doubt whether a parol acceptance be good, as in the case of *Lumley and Palmer*, [the preceding case] and I had a case made of it for the opinion of the court; and it was several times argued, and at last solemnly determined, that such acceptance is good; much more therefore an acceptance by letter. As to the plaintiff's being entitled to interest, I think it a clear case that he is, though no protest has been made, for that it is necessary only to entitle the payee to damages against the drawer; and all the damage that can be had in such a case is the interest. —The decree was for the defendant to pay the bill of exchange with interest for the same from the time of filing the original bill, at the rate of four *per cent.* and to pay the costs of this suit from the time of filing the bill of revivor¹.

3. If a bill is accepted in writing and not paid when become due, drawer will be liable to costs and damages. And the construction of the statute 3 & 4 Ann. is, that to charge the drawer therewith the drawee must refuse to accept in writing^k; whereupon protest may be made, as shewn, with the use and effect thereof, in our fifth chapter.—The acceptance is usually written at the bottom of the bill, as in the forms laid down in C. III. § 1. par. 5. Yet it may be by an indorsement on the back, as mentioned in C. V. § 1.

4. An acceptance may be qualified, as to pay half in money and half in bills. So to pay when goods sent by the drawer are sold. But he to whom the bill is due may refuse such acceptance and protest the bill so as to charge the drawer^l; and a bill may be accepted as for part of the sum drawn for; but such acceptance

¹ 1 Atk. 611.

^k 6 Mod. 80, 81.

^l Law of Nisi Prius, 279. Edit. 1785.

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tance may be refused, as may any acceptance which is not general, as for the payment of the full sum of money mentioned in the bill according to its tenor; whereof further mention will be made hereafter in § VIII. par. 1, 2.

§ II. 1. IN SUBSCRIBING an acceptance not intended to be general, and to oblige the acceptor to pay according to the tenor of the bill, due care should be taken that it may operate according to the acceptor's intention; as by the words thereof it will have effect, which will presently be demonstrated; and further mention hereof will be made in § III. latter part of par. 3. And hereafter in § XI. par. 2. is shewn, that the acceptance of a servant usually transacting business for a master will bind such master; but on a general acceptance by a servant without expressing it to be for his master the servant is liable.—If a bill drawn on a factor, payable out of the produce of goods, after discharging prior acceptances, is accepted by him generally, the same is chargeable on him, notwithstanding any balance then due to him in a running account with his principal, and if the factor had meant to reserve his own balance he should have made a special acceptance; as was held in the case of *Maber v. Massias*, Easter, 16 Geo. III. wherein a verdict having been given for the plaintiff, with 195l. damages. On a new trial being moved for, chief justice De Grey reported, that William Watts, a merchant, who traded to Gibraltar, employed the defendant, Massias, as his factor there, who used to consign Watts's goods to certain agents in Barbary for sale. Massias used to keep an account with the agents, and another with Watts; but Watts had no communication with the agents. On the 21st of May, 1772, Watts drew on Massias a bill in the following terms, for balance of an account that day stated between Watts and the plaintiffs, being merchants, with whom he had dealings, viz. "Sir, please to pay to Messrs. Maber and Kentish, or order, 195l. 14s. 10d. out of the produce of goods you have of mine, now lying at Gibraltar, Barbary, and Leghorn, as soon as the same shall come into your hands, after discharging the present acceptances.

" To Mr. Moses Massias,

" William Watts,

" No. 63, Prescot-Street."

Which bill Massias accepted in the following words under written thereto.

" I agree to conform to this order, *Moses Massias*."

BEFORE any payment on this bill Watts became a bankrupt, and on Massias's refusing payment, this action was brought for

money had and received to the plaintiff's use ; and on the trial, gave evidence that Massias had, in 1772 and in 1773, large quantities of Watts's goods in his hands, to the amount of 1657l. in 1773, and more in 1772. And that he had paid large sums for Watts ; but whether for engagements, prior to 1772 or not, did not appear. The defendant gave evidence of divers prior engagements, which did not cover the whole account ; and also that there is, and was at the time of the acceptance, a balance due to Massias himself of 870l.

ADAIR, counsel for the plaintiff, having shewed cause why there should not be a new trial.—By the court (chief justice De Grey, Gould, Blackstone, and Nares, justices) : The question is, Whether the defendant had in his hands 195l. for the use of the plaintiff ? He is proved to have had goods to the amount of 1657l. and that his acceptances, in the common and technical sense of the words, as applied to bills of exchange, together with certain other indorsements, by which he had engaged himself to pay money for Watts, left a balance in his hands more than sufficient to pay the plaintiff ; if we exclude the balance of 870l. due to Massias himself. This balance, then unliquidated, could never be meant to be provided for ; nor was the bill or its acceptance meant to be subject to it. For then there would have been fraud in the drawer, and also in the acceptor ; for both knew, or must be supposed to know, at least Massias knew, how the balance then stood. If he meant to have reserved his own balance, he should have made a special acceptance. But having accepted it generally in the terms of the draft, that is, subject only to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account.—Rule discharged^m.

THAT acceptance may be conditional and charge only when the condition is performed, will be seen in the ensuing section.—Whether an acceptance is absolute or conditional is matter of law and not of fact ; as it is the province of the court to determine. The payee must at the time of tendering the bill, take it in one light or the other and abide by his election. For if he conceives the acceptance to be conditional, and so notes the bill, it is shewing that he considered the bill not absolutely accepted ; and in such case he cannot afterwards recover against the drawee ; as in the case of *Sproat v. Matthews*, Easter, 26 Geo. III. where a bill of exchange was drawn upon A. residing in London, by a consigner of goods living abroad ; on its being presented for acceptance, A. said he could not then accept, because he did not know whether the ship would arrive at Lon-

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don or Bristol. B. the holder of the bill, agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance, in case A. did not accept. On a second application, A. said, the bill would be paid *even if the ship were lost*. This is only a conditional acceptance, depending on two events, of the ship's arriving at London, or being lost. And B. having the liberty of refusing such conditional acceptance, precludes himself from recovering against A. by afterwards noting the bill for non-acceptanceⁿ.

§ III. I. A CONDITIONAL acceptance, which only charges when the condition is performed, may be where it is made with reference to some fund which is to provide for payment of the bill; as in the case of *Pierston v. Dunlop*, where the drawees of a bill of exchange received a navy bill payable to themselves, as a counter security for the payment of the bill drawn on them, and on the bill being tendered for acceptance, they said, that they could not accept the bill of exchange till the navy bill was paid. This was held to be a conditional acceptance, and when the money was received on the navy bill to become absolute against the acceptor^o. But in the case of *Wilkinson v. Lutwidge*, where defendant on whom bills were drawn, in a letter said, I will pay the bills in case the owners of the ship *Queen Ann* do not, I think it necessary to acquaint them, but rest satisfied of the payment. This was held an absolute acceptance^p.

2. ACCEPTANCE may be by collateral agreement and be binding before the bill has existence; as in *Pillans and Rose v. Van Mierop and Hopkins*, E. 5 Geo. III. where plaintiffs were merchants in Holland, agreed to pay a bill of one White's on them from Dublin, on condition that White would give them a credit on some house in London to the amount of the bill. White named defendants, and the plaintiff having written to them to know if they would accept a bill on them on White's account, they agreed to do it; it was adjudged that this was a sufficient agreement to accept, and bound defendants to the payment of the plaintiff's bill so drawn. By the evidence in this case it appeared that one White, a merchant in Ireland, desired to draw on the plaintiffs, who were merchants at Rotterdam in Holland, for 800l. payable to one Clifford: and proposed to give them credit upon a good house in London, for their reimbursement, or any other method of reimbursement. The plaintiffs, in answer, desired a confirmed credit upon a house of rank in London, as the consideration of their accepting the

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bill.

* 1 Durnf. & East, Rep. 182.

o Cowp. 575.

p 1 Str. 648.

bill. White named the house of the defendants, as this house of rank, and offers credit upon them. Whereupon the plaintiffs honoured the draft and paid the money, and then wrote to the defendants Van Mierop and Hopkins, merchants, in London, (to whom White also wrote about the same time) desiring to know whether they would accept such bills as they the plaintiffs should in about a month's time draw upon the said Van Mierop and Hopkins's house here in London for 800l. upon the credit of White: And they having received their assent, accordingly drew upon the defendants. In the interim, White failed, before their draught came to hand, or was even drawn: And the defendants gave notice of it to the plaintiffs and forbade their drawing upon them. Which they nevertheless did: And therefore the defendants refused to pay their bills.

THIS case was twice argued in the court of King's Bench. The resolution of the judges hereon was to the following effect, *viz.* That by promising to answer the plaintiffs drafts, the defendants admitted that they either had effects of White in their hands, or that they had credit on him. There was no pretence for the objection of this being a naked agreement; whatever might be said in other cases of a naked agreement or the want of consideration, there was no such thing in the custom of merchants with respect to bills of exchange. The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having or being supposed to have effects in his hands, but from the convenience of trade and commerce: the acceptance is an obligation to pay, though the acceptor have no effects of the person on whose account the bill is drawn, and though there be no consideration. The end of the institution of bills, their currency requires that it should be so. This case is the same as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs: it would have been immaterial to the plaintiffs whether Van Mierop and Hopkins had effects of White or not, if they had accepted his bill: what was done here amounts to the same thing; to promise to give the bill due honour, is, in effect, to accept it: if a man agree to do the formal part, the law, in the case of an acceptance of a bill, considers it as actually done: the defendants could not afterwards retract; it would be destructive to trade and credit if they might.

3. ACCEPTANCE by collateral agreement, if conditional, is not binding, unless the condition be performed: as in the case of *Mason v. Hunt*, Mich. 20 Geo. III. where a partner of an house in London, being then at Dominica, wrote to defendant,

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his partner in London, to accept the bill of an house in Dominica, on their sending him tobacco at 8ol. per hoghead, and ordering an assurance. It was held, that this did not bind the partner absolutely to accept; for it was conditional, *That tobacco be consigned, that is, of such a value, and that an insurance be made.* If any of these fail, there is no binding agreement to accept, and so to charge the drawee; and here the tobacco's in fact only producing 4ol. per hoghead the defendant was held not to be liable.—After verdict was given in this case, a rule for a new trial being obtained, and arguments thereon, the opinion of the court was delivered by Lord Mansfield; when his lordship, stating the defence made at the trial, says, there is no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better condition than the drawer. If one man to give credit to another makes an absolute promise to accept his bill, the drawer or any other other person may shew such promise upon the exchange to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor. But an agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions^r.

HENCE it may be observed that, if a man purposes making a conditional acceptance only, and commits that acceptance to writing, he should be careful to express the condition therein; for of any verbal condition he may annex to the acceptance he will not be at liberty to avail himself against any subsequent transferee, if either such transferee, or any intermediate party between him and the person to whom the acceptance was given, took the bill without notice of such condition, and gave a valuable consideration for it, and at all events the burthen of proving such acceptance will be upon the acceptor.

IF there be a virtual acceptance on consideration that goods shall be consigned to the acceptor, to answer the bill, together with a policy of insurance upon them, the holder of the bill, by taking to the goods and selling them, discharges the acceptance^s.

§ IV. HAVING heretofore treated on absolute and conditional acceptances, whereby it is perceivable that the latter depending on certain conditions, are both chargeable and discharged pursuant to these different conditions; but the former always
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^r Doug. Rep. 297. 2 Edit.

^s *Ibid.*

bind the acceptor, so that he cannot be discharged from his acceptance without an express declaration from the holder, or something equivalent thereto, (which will be demonstrated in our ensuing section), or unless it be by the law of the country where the bill is accepted, as in the case of *Burrow v. Gemino*, where a bill was accepted at Leghorn by the plaintiff, and by the laws of that place, if a bill is accepted, and the drawer fails, and acceptor has not sufficient goods in his hands, he shall be discharged from his acceptance, which here was the case. It was held in chancery on a bill for an injunction, plaintiff being sued at law in England on his acceptance, that the acceptance being declared void by the laws of that place, was void every where, and acceptor discharged^t.

§ v. THAT ACCEPTOR cannot be discharged without an express declaration from the holder, was held in the case of *Dingwall v. Dunster*, Mich. 20 Geo. III. The plaintiff as indorsee of a bill of exchange for 400l. dated 10th of July, 1774, and payable in five months, brought an action of *assumpsit* against the defendant, as acceptor; and the cause came on to be tried before Lord Mansfield, at the last sittings for Middlesex, when two sorts of defence were set up. 1. That the bill was given for money won at play. 2. That the plaintiff by his conduct, though not in express terms, had agreed to discharge the acceptor, and seek his remedy only against the drawer.

To prove that the money was won at play, the defendant's counsel called the drawer, (one Wheate) who had been discharged under an insolvent debtor's act; but as his future effects still remained liable to the debt, his lordship rejected him, as an inadmissible witness; and the cause went to the jury on the other question^u. They found for the defendant; upon which the plaintiff obtained a rule to shew cause why there should not be a new trial, which now came on to be argued. The most material facts of the case were as follows: The bill was accepted by the defendant merely to lend his credit, and accommodate the drawer. Fitzgerald, the payee, indorsed it to the plaintiff, and delivered it to him in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for accepting it, and that Wheate was the real debtor, wrote to one Ready, (Wheate's attorney) on the 6th of February, and on the 4th of November, 1775, pressing him for the payment.—Dunster on the 13th of February,

^t 2 Str. 733.

^u If it had been proved, that the bill was for money won at play, it would have been void in the hands of the plaintiff, though an innocent indorsee for valuable consideration; as shewn in C. VII. § 11. par. 1.

February, 1775, wrote a letter to Dingwall, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who had been sent from him to Dingwall on the business, that Wheate had taken up the bill, and given another to Dingwall's satisfaction. It did not appear that Dingwall took any notice of that letter. Dingwall for some time received interest upon this bill from Wheate, and also the principal due by another bill which was made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years to elapse without calling upon Dunster, or treating him as his debtor.

The defendant's counsel cited the cases of *Black v. Peele*, and *Walpole v. Poultney*. The substance of which we shall here relate as reported, and afterwards the separate opinions of the judges, omitting any further mention of the counsel's arguments.

IN the case of *Black v. Peele*, one Dollas was the drawer, Peele the acceptor, and Black an indorsee. Black arrested Peele, but finding that no consideration had been given for the acceptance, his attorney took a security from Dollas, and sent word to Peele, that he had settled with Dollas, "and he need not trouble himself any further." The cause was first tried before Lord Mansfield, and afterwards before Chief Justice De Grey, who held the acceptance was discharged.—In *Walpole v. Poultney*, a book of the plaintiff's own was produced, in which the bill was entered, and over against it this memorandum, "Mr. Poultney's acceptance annulled." On the first trial of this cause a verdict was found for the plaintiff, but on a second trial, when one Alexander, who had indorsed the bill to Walpole, was produced as a witness on the part of the defendant, and swore that Walpole had positively agreed to consider Poultney's acceptance as at an end; the jury found for the defendant. Walpole had kept the bill from 1772 to 1775, without calling upon Poultney.

LORD MANSFIELD: There is no doubt but a holder of a bill may discharge any of the parties, but there is this difference between the acceptor and the others, that the acceptor is first liable, and, to be intitled to have recourse against him, it is not necessary to shew notice given to him of non-payment by any other person. In the present case the question is, whether any thing has in fact been done to discharge the defendant. The plaintiff being apprized that Wheate was the person for whose benefit the bill was drawn, did right in considering him as his debtor, and recurring to him for payment. The defendant was sensible of his kindness in not resorting to him

him in the first instance, and wrote to thank him for it. No use was made at the trial, nor on the present argument, of what might have been a material circumstance, viz. the defendant's having written to the plaintiff, that he had been informed by a person who had been sent from him to the plaintiff to talk with him about the bill, that it had been delivered up to Wheate. Probably the fact did not warrant him in this assertion. If the plaintiff, by any thing in his conduct, had confirmed him in such a belief, it might have altered the case; but nothing of that sort appears. I think there is no ground to say he was discharged.

JUSTICE WILLES: I am of the same opinion. I do not think silence can discharge the acceptor. No case of a tacit discharge has been produced. In *Black v. Peele*, the discharge was in express words. In *Walpole v. Poultney*, the case was put upon the entry in the book being an express discharge. Besides that case is still depending.

JUSTICE ASHHURST: I am of the same opinion. An acceptor makes himself the debtor, and his case is different to that of the other parties to the bill. Nothing but an express discharge will do. The defendant endeavours to prove a discharge from letters, but they do not come up to it, and the conduct of the plaintiff amounts only to indulgence towards the acceptor.

JUSTICE BULLER: I am clearly of the same opinion. Nothing but an express agreement can discharge an acceptor. And nothing of that sort appears in this case. The plaintiff's conduct meant nothing more, but that he would try to recover from the drawer, who was the original and true debtor, if he could.—The rule was made absolute^w.

§ VI. IF payee receive part from the drawer, acceptor is not discharged thereby; nor although he suffer several years to elapse before he sue the acceptor. In the case of *Ellis v. Galindo*, Mich. 24. Geo. III. in which an action of *assumpsit* was brought by the payee of a bill of exchange, for 30l, against the acceptor. The drawer and acceptor were brothers. When the bill became due, the plaintiff received of the drawer 3l. 15s. 4d. and at the same time, the following indorsement was made on the bill, viz. "Received on account of this bill 3l. 15s. 4d. Balance remaining 26l. 4s. 8d. I promise to pay to Mr. Thomas Ellis, within three months from the date of this." Signed by James Galindo, who was the drawer. The balance was never paid, and at the distance of three years this action was brought against the acceptor. The cause was tried before lord Mansfield,

^w Doug. Rep. 247. 2 Edit.

Mansfield, who thought the acceptor was discharged, and nonsuited the plaintiff.

BUT a rule being obtained to shew cause why there should not be a new trial, it was contended for the plaintiff by the solicitor general (Lee), and Baldwin, that the indulgence for three months could no more be held to amount to a discharge, than the payment of part, and that it was clear law, that payment of part by the drawer would not discharge the acceptor. An acceptor and drawer stand in different situations. The indorsement was made to prevent an imputation of *laches*, because delay in coming against an acceptor may discharge a drawer or indorser. But nothing under the limitation of six years will discharge the acceptor.

BY LORD MANSFIELD: The doubt is, whether, instead of a nonsuit the question should not have been left to the jury, it being a question of intention arising out of the circumstances. The bill was probably an accommodation bill, as the drawer and acceptor were brothers.—Justice Willes: It was established by *Dingwall v. Dunster* [the case in the preceding section], that *laches* [negligence] will not discharge the acceptor. My doubt is, how far this indorsement necessarily discharges the acceptor, and I think that question ought to have been left to the jury.—Justice Buller: There is no doubt as to the law. It is as has been stated by the counsel for the plaintiff. I rather think the case should have gone to the jury. But I am not, therefore, of opinion that there should be a new trial. The indorsement could not have been meant as an additional security, for the drawer was equally liable before. I should have left the question to the jury, but with very strong observations; and as the demand is so small, I do not think there should be a new trial.—Rule discharged*.

§ VII. IF the indorsee accept any part of the money from the acceptor, he cannot afterwards resort to the drawer for the remainder of the money, unless he give timely notice to the drawer that the bill is not duly paid: For where a man takes part of the money only, and does not apprize the drawer that the whole is not paid, he gives a new credit for the remainder. But where timely notice is given that the bill is not duly paid, the receiving part of the money from an acceptor or indorser, will not discharge the drawer or other indorsers. For it is for their advantage that as much should be received from others as may be^y.

§ VIII.

* Doug. Rep. 250. 2 Edit. n.

^y Law of Nisi Prius, 271, Edit. 1785.

Cites *Johnson v. Kenyon*, C. B. Hil.
5 Geo. III.

§ VIII. AS CONCERNING presenting a bill for and procuring acceptance thereof. Cautions to acceptors. The acceptor's engagement, and how he is discharged therefrom. 1. Concerning taking a copy or abstract of a bill previous to leaving it for acceptance; what to be done if a bill be lost when left for acceptance; and of sending bills to procure acceptance, will be treated on hereafter in par. 4, 5. And here we shall proceed with presenting a bill for acceptance.—When a bill of exchange is drawn payable after sight or date, the former of which must be presented for acceptance; as that from the day next ensuing the date of the acceptance the time of its payment is reckoned; and the latter may be presented, as shewn in C. II. § IV. par. 4. it is usual for the payee or indorsee to present the bill at the drawee's place of residence for acceptance, and leave it with the drawee till the next day, as is usual; and it seems according to the custom of merchants, the party on whom the bill is drawn may have twenty-four hours to consider whether he will accept it or not^a. After the bill hath been thus left with the drawee, and he on being called on refuse to accept according to its *tenor*; or, if he could not be found, after due diligence used to find him for presenting the bill to him; as in the case of presentment for payment, treated on C. VIII. § I. the holder, if it be an inland bill of the value of 20l. or upwards, made payable after date, and expressed to be for value received; or if it be a foreign bill made payable after date or sight (as treated on in C. V. § I. par. 5.) may cause the same to be protested for non-acceptance; and notice of such protest must be given, or the protest itself, in case of a foreign bill, sent to the drawer or indorser, by the next post after the acceptance is refused; and the notice of an inland bill being refused should be given or sent without delay to the drawer or indorser, in like manner as in case of non-payment, in which it seems to be now established that, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, notice must be sent by the next post; whereof we shall treat more particularly in our ensuing chapter.—If a bill be drawn on two who are not in partnership, in order to bind both a joint acceptance is necessary; as shewn hereafter in § XI. where we have likewise treated on acceptance by a book-keeper or servant.

AN acceptance varying from the tenor differs from it either in the sum, the time, the place, or mode of payment. But though any of these acceptances bind the person making them, the holder of a bill is entitled from the undertaking of the drawer and indorsers

indorsers to expect an absolute acceptance by the drawee, or if there be several not connected in partnership by each, written by him or them personally upon the bill, expressing, if the bill be payable within a limited time after sight, the time of its presentment for acceptance; and any other may be refused.—If the acceptance direct the payment to be made at a place different from that mentioned in the bill, as at the house of a banker; in which case, it is said, if the holder neglect to demand payment within a reasonable time, and the banker afterwards fail, he must stand to the loss^b. But in an action against the acceptor of a bill on an acceptance to pay at his banker's, the plaintiff could not prove a presentment at the banker's; notwithstanding which the jury found for him: the court held the proof unnecessary, and refused to grant a new trial^c.

2. If the bill be presented to the drawee, and he refuse to accept it, an action will immediately lie against the drawer, as will be seen in the ensuing section; and in § x. we shall treat on accepting a bill in part; acceptance to pay at a longer time than mentioned in the bill; of accepting after the day of payment is elapsed; and here proceed to mention by way of caution to acceptors, that in subscribing an acceptance not intended to be general, and to oblige the acceptor to pay according to the tenor of the bill, care should be taken that it may operate according to the acceptor's intention, as heretofore mentioned in § II. par. I.

WHERE the bill is drawn for the account of a third person, and accepted according to its tenor for his account, and he fails without making provision for its payment, the acceptor is obliged to discharge his accepted draft, and can have no redress against the drawer^d.—If a person on whom a bill is drawn scruples the accepting it for the account of him it is advised to be drawn for, or if through want of advice he is ignorant for whose account it is drawn, he may accept the same (*supra* protest) if he pleases, for the account and honour of the drawer.—When a bill is made payable to order, and indorsed by a substantial man, before acceptance be demanded, and the acceptor scruples to accept it for the account of the drawer, or for the account of him it is drawn for, he may (if he thinks proper) do it *supra* protest, for honour of the indorser; and in this case, he must first have a formal protest made for non-acceptance, and should send it without delay to the said indorser, for whose honour and account he hath accepted the bill^e. These acceptances,

supra

^b *Bishop v. Chitty*, 2 Str. 1195.

^c *Smith v. De la Fountain*, B. R. Trin. 25 Geo. III. Baile's App. No. 5.

^d *Beawes*, 456.

^e *Id. ibid.*

supra protest, which will be more particularly treated on hereafter in § XI. par. 3. will oblige the acceptor as absolutely to the payment, as if no protest had intervened^f.

3. THE acceptor's engagement, and how he is discharged therefrom, having been heretofore treated on in § III. IV. V. VI. we need here only make some brief observations thereon by way of reminding the reader of what has heretofore been mentioned, with some little addition thereto for the acceptor's further information.

By accepting, the acceptor renders himself liable according to the tenor of his acceptance, and if he accepts a bill *generally*, and in case of his non-payment the drawer pays it, the latter after payment by him is the holder, and may maintain his action against the acceptor in his original capacity as drawer; as shewn in C. IX. § 1. latter part of par. 4. Yet if the drawee have no effects of the drawer in his hands, and notwithstanding accept the bill, he has his remedy, if he pays it, against the drawer; as shewn in C. IX. § IV. par. 4. However with respect to every one besides the drawer, the acceptor is considered as the original debtor; he is bound to pay though there be no effects or consideration; as heretofore shewn in § III. par. 2.; and in order to have recourse to him it is not necessary for the holder to shew notice given him of non-payment by any other person; as shewn in § V. and likewise that the acceptor cannot be discharged without an express declaration from the holder of the bill, or something equivalent thereto; and that no indulgence shewn to the acceptor by the holder, or an attempt by him to recover of the drawer, will amount to an express declaration of discharge. So in § VI. it is shewn, that receiving part of the drawer on a promise by indorsement on the bill by the drawer to pay the residue, or any length of time short of six years will discharge the holder's remedy against the acceptor.

4. WHEN a bill of exchange is drawn and delivered to the payee, it may be prudent for him to take an exact copy thereof before the bill is left for acceptance; and the person who leaves it (if he has not an exact copy) should have the principal contents of the bill, viz. the number (if it be numbered,) date, drawer's name, sum drawn for, when payable, and to whom, minuted down in writing, whereby he may be sure to identify the bill when he calls for it.—If a bill, when left for acceptance, be lost, he to whom it is payable is to request the drawee to give him a note for the payment according to the time limited in the bill; otherwise there must be two protests, one for non-payment, the other for non-acceptance^g.—A bill being lost when

^f Beawes 456.

^g Law of Nisi Prius, 271, Edit. 1785.

when left for acceptance, the drawee, if he intended to accept, should give a note under his hand for the payment of the sum mentioned in the bill to the payee, or to his order upon delivery of the second, if it come in time, or if not, upon that note, which is in all respects and cases to have the law privilege of a bill of exchange. If such note be refused, protest should be immediately made for non-acceptance, and forwarded to the drawer or remitter; as that for non-payment should be (though there is neither bill nor note to demand it on) if the contents of the lost bill are not satisfied at the time limited for payment^h.

WHERE the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy; as where A. drew a first and second bill payable by himself in Dublin to B. or order. B. after the bill was due, negotiated it with the plaintiff; who on the same day indorsed it to D. living in Dublin, in these words, pay to D. value on my account. The first of these bills was sent to D. and lost on the way, and the drawer being gone, no third bill could be had, and lest the second should miscarry as well as the first, an exact copy of the second bill was sent to D. and demand of payment being made, the same was refused, because the money had been attached in the hands of the party who was to pay the bill; the protest was made on the copy, and at the trial the original second bill, along with the protest on the copy, was produced and held goodⁱ.

5. IF A. write his name on the back of a bill, and send it to J. S. to get it accepted, which is done accordingly, A. may notwithstanding bring an action against the acceptor, for J. S. has it in his power to act either as servant or assignee; for he may witness his election by filling up the blank over the name to receive it as indorsee, or by omitting it act only as servant^k.—Where a person has bills sent to him to procure their acceptance, with directions to return them or hold them at the orders of the seconds, &c. and he to whom they are so sent either forgets or neglects to demand acceptance, or if he suffers the party on whom they are drawn to delay their acceptance, and the drawers in the interim fail, this will not subject him to a payment of their value; but, it is said, if he be urged and pressed to procure acceptance and payment to a bill sent him, and should protract, or refer the getting it done, and the acceptant, being ignorant of the drawer's circumstances, declares he would have accepted it, had it been timely presented, the person guilty of this neglect will be obliged to make good the loss, that has happened to his correspondent purely through his omission and carelessness^l.

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§ IX. AC-

^h Beawes, 454. 4 Edit.

^k Law of Nisi Prius, 273.

ⁱ *Dubois v. Harriott*, 1 Show. 164.

^l Beawes, 454. 4 Edit.

§ IX. ACCEPTANCE if refused, an action will lie upon the bill against the drawer, before the time when it is made payable; as in the case of *Milford v. Mayor*, Hil. 19 Geo. III. On a rule to shew cause why the defendant should not be discharged. The ground was, that by the affidavit on which he was held to bail, it was sworn, "that he was indebted to the plaintiff as indorsee of a bill of exchange," but that the bill in fact was not yet due. The defendant was the drawer of the bill, and the drawee had refused to accept it.—By justice Buller: It is settled, that, if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, although the time of payment is not come. This I remember to have been determined in the year 1765, in a cause in which Sir Fletcher Norton was counsel for the defendant¹. The reason is this, as lord Mansfield said in that case, that what the drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract. There have been a great many actions of the same sort since that time.—Justice Willes and Ashhurst being of the same opinion with justice Buller, (lord Mansfield absent) the rule was discharged^m.

§ X. AS a person when drawn on may totally refuse acceptance, he may accept the bill in part; but the payee may refuse such acceptance, and protest the bill, so as to charge the drawer. A bill may be accepted for part, where the party upon whom drawn hath no more effects in his hands; which is usually done; and in such case there must be a protest immediately for the residue. An acceptance to pay less than is mentioned in the bill is good for so much against the acceptorⁿ.

AND with respect to this acceptance as well as the acceptances mentioned in the following paragraphs, should be observed, what is heretofore mentioned in § VIII. par. I. concerning the time in which notice is to be given or sent to the drawer or indorser. For if the drawee offer an acceptance varying from the tenor of the bill, and the holder agree to take it, he must send the same timely notice to the preceding parties, as in case of acceptance refused, in order that he may have recourse to them^o.

2. AN acceptance may be to pay at a longer time than mentioned in the bill.—In the case of *Price and Shute*, Easter, 33 Car. II. where a bill was drawn payable the first of Ja-

¹ *Bright v. Purrier*, Law of Nisi Prius, 269. Edit. 1785.

^m Doug. 55. 2 Edit.

ⁿ *Strange*, 2:4.

^o Mar. 17.

nuary; the person upon whom the same was drawn, accepts it to be paid the first of March; the servant brings back the bill. The master, perceiving this large acceptance, strikes out the first of March, and puts in the first of January, and then sends the bill to be paid. The acceptor then refuses. Whereupon the person to whom the moneys were to be paid, strikes out the first of January, and puts in the first of March again. On an action brought on this bill, the question was, Whether these alterations did not destroy the bill, and it was ruled they did not^p.

3. IN the case of *Jackson v. Pigot*, 10 Will. III. where a bill was drawn payable such a day, and the drawee accepted it after the day of payment was elapsed, it was held the acceptor was liable to the payment thereof^q. And in the case of *Mutford v. Walcot*, 1 W. III. where acceptance was after the day of payment. By chief justice Holt: Acceptance after the day of payment is common, and there is no inconveniency in it^r.

4. IF a bill is not accepted, to be paid when due, but for a longer time, the party to whom the bill is made payable, must protest the same for want of acceptance, according to the tenor; yet he may take the acceptance offered; nor can the acceptor, if he once subscribes the bill for a longer time, revoke his acceptance or blot out his name, although it is not according to the tenor of the bill; for by his acceptance, he hath made himself debtor, and owns the draft made by his friend upon him, whose right another man cannot give away, and therefore cannot refuse or discharge the acceptance.—This case will admit of two protests, perhaps three. 1. One protest must be made for non-acceptance according to the time the bill is payable at. 2. For that the money being demanded according to the time mentioned in the bill, was not paid. 3. If the money is not paid according to the time the acceptor subscribed for^s.

§ XI. 1. AS to acceptance by partners. In the case of *Pinkney v. Hall*, 8 W. III. it was held, that if a bill be drawn on one person only, the payee must regularly resort to the drawee, and desire him to accept; and if drawn on two, it must

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^p Molloy, b. 2. c. 10. sect. 28. Beawes, 481. 4 Edit.
^q 1 Salk. 127.

^r Ld. Raym. 574.
^s Beawes, 481. 4 Edit.

must regularly have a joint acceptance; but by the custom of England, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both, if it concerns the joint trade; otherwise if it concerns the acceptor only in a distinct interest and respect[†].

IN case of two joint traders, the acceptance of one will bind the other, because they trade for a common benefit, and therefore where one of them gives credit, it is the act of them both; but if a factor of an incorporate company draw a bill on such company, and any member accept it, it shall not bind the company, nor any member of it, because it is only a private act of such person, and not a corporate act of the company. Also if ten merchants employ one factor, and he draw a bill upon them all, and one accept it, it shall only bind him and not the rest, because they are separate in interest one from the other^W.—Concerning partners, and the act of one binding the rest further mention is made in C. VI. § VII. par. 1, 2, 3.

2. WHERE a book-keeper, or servant, or other person, having authority, [treated on in C. III. § 1. par. 1.] or usually transacting business of this nature for the master, accepts a bill of exchange, this shall bind such master^{*}; and it seems that usual employ is evidence of such general authority, as will continue to bind the master till its determination be publickly known; concerning which more particular mention is made in C. IX. § II. par. 7. and in C. VI. § VII. par. 4. is a description of the difference between a special agent under a limited authority, and a general agent.

ON a general acceptance by a servant without expressing it to be for his master, the servant is liable; as in the case of *Thomas v. Bishop*, Mich. 7 Geo. II. where the plaintiff was indorsee of a bill of exchange, drawn from Scotland, upon the defendant, in these words, "At thirty days sight pay to J. S. or order 200l. value received of him, and place the same to the account of the York-buildings Company, per advice from Charles Mildway. To Mr. Humphry Bishop, cashier of the York-buildings Company, at their house, in Winchester-Street, London. Accepted 13th June, 1732, per H. Bishop." The bill not being paid, an action was brought against the defendant on his acceptance. And the defendant proved that the letter of advice was addressed to the company; and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner as he

[†] 1 Salk. 126. Ld. Raym. 175.

^W Gilbert's Law of Evidence, 117, 118.

^{*} 3 New Abr. 611.

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he had accepted other bills. But Mr. justice Page, who tried the cause, directed the jury to find for the plaintiff, which they did accordingly.

AND upon a motion for a new trial, the court held this direction to be right. For the bill, upon the face of it, imports to be drawn upon the defendant, and it is accepted by him generally, and not as servant to the company, to whose account he had no right to charge it, till actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit of evidence arising from such extrinsic circumstances, as the letter of advice. And they said, this differed widely from the case of a bill addressed to the master, and underwrote by the servant; where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of the master. A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained against them upon the bill; for the addition of cashier to the defendant's name is only to denote the person with more certainty, and the York-buildings house is only to inform the order where the drawee is to be found; and the direction, whose account to place it to, is for the use of the drawee only. And they compared it to the case in *Carth. 5. 2 Ven. 307.* [in C. VI. § VI. par. 3.] where a bill was drawn payable to Price for the use of *Calvert*, and held that the legal property was in Price, which is stronger than the present case. They said, it might be otherwise if the action had been by J. S. who was privy to the transaction, and it had appeared he tendered the bill as a bill on the company. But this plaintiff being a stranger, they could not consider those circumstances.—The plaintiff had judgment^a.

3. As to acceptance and payment for honor. By the custom of merchants, if one merchant draw a bill which is protested, and another hearing thereof declares, that he, for the honor of the drawer, will pay the contents, and thereupon subscribes in these or the like words, *I the underwritten do bind myself as principal according to the custom of merchants, for the sum mentioned in the bill of exchange whereupon protest is made, &c.* This shall as effectually bind him as if he had been the original drawer; and by this the person to whom the bill is payable hath his remedy both against such person as surety, and also against the principal; but the principal or original drawer is liable to him who thus subscribes for his honor^b.—If a bill be drawn on

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J. S.

^a Strange, 955.^b 3 New Abr. 608, Molloy, B. 2. C. 10. § 24.

J. S. and he refuses to accept it, or if he be out of town, and has left no orders or authority to accept bills; and that A. B. will accept the bill for the honor of the drawer: in either of these cases, the party to whom the bill is payable, or his assigns, ought in the first place to cause protest to be made for non-acceptance by J. S. and then he may take the acceptance of A. B. for the honor of the drawer; for otherwise the drawer may alledge that he did not draw the bill on A. B. but on J. S. and therefore, according to the custom of merchants, diligence ought to be first used towards J. S. and by protest to prove the want of his acceptance^a.

SUCH acceptance is called acceptance *supra* protest. The method thereof is said by Peawes to be this; the acceptor must personally appear with witnesses before a notary, (whether the same who protested the bill or not, is of no importance) and declare that he accepts such protested bill in honor of the drawer or indorser, &c. and that he will satisfy the same at the appointed time; and then he must subscribe the bill thus; "Accepted *supra* protest in honor of J. B. &c.^b"—An acceptance *supra* protest may be so worded, that though it be intended for the honor of the drawer, yet it may equally oblige the indorser, and in such case it must be sent to the latter^c.

IF the person on whom a bill is drawn refuse to accept it, or if he cannot be found, any other person after protest for non-acceptance may accept for honor of the drawer or any particular indorser: if he accepts for honor of the drawer, he is bound to all the indorseees as well as the holder; if in honor of a particular indorser, to all subsequent indorseees^d.

ANY one accepting a bill *supra* protest, either for the honor of the drawer or indorser, though it be done without their orders or knowledge, hath his redress and remedy on the person for whose honor he accepted it, who is obliged to indemnify him, as if he had acted entirely by his directions. But he who accepts for honor of the drawer, hath no remedy against any of the indorsers, because he obligeth himself only for the drawer, and he that accepts for honor of an indorser, can have no advantage from any one, subsequent to him for whose honor he accepted; but he and all that were before him, the drawer included, are obliged to make the acceptor satisfaction^e; who by his accepting *supra* protest, will be as absolutely obliged to the payment as if no protest had intervened; as heretofore mentioned in § VIII. par. 2.

IF

^a Marius, 88.

^b Peawes, 457.

^c *Id.* *ibid.*

^d *Id.* *ibid.*

^e *Id.* 457, 458.

If a bill be protested for non-acceptance, and after being accepted *supra* protest by a third person, the intended acceptant, on receiving fresh advice and orders, determines to accept and pay it, the acceptor *supra* protest may suffer it, though the possessor cannot be obliged to free him from his acceptance; and in case the two acceptors agree, he who was originally designed such, is obliged to pay him who has accepted *supra* protest, his commission charges, &c. as it was by his acceptance that the bill was prevented from being returned protested^e.

If the acceptor of a bill for honor of the drawer or indorser, receive his approbation of the acceptance made, the acceptor may freely pay the bill, without any protest for non-payment; but if the person for whose honor the bill was accepted, returns no answer to the advice, or replies with a disapproval thereof, the acceptor *supra* protest must cause a formal one to be drawn up for non-payment, against him to whom the bill was directed, and on his continuing to refuse payment must pay it for him^f.

WHEN a bill is protested for non-payment, any man may pay it under protest for the drawer's or indorser's honor, even he that made, or he that suffered the protest. But no man must pay a bill under protest for non-payment, till he has declared before a notary public, for whose honour he discharges it, whereof the notary must give an account to the parties concerned, either jointly with the protest, or in a separate instrument^g.

HE who discharges a bill protested for non-payment, in honor of the drawer, hath no remedy against the indorsers; though he who honors a bill protested for non-payment, for an indorser, hath his remedy not only against the indorser, but against all that were before him including the drawer, but hath no right against subsequent indorsers; as above mentioned concerning accepting bills^h.

A MAN after having freely and willingly accepted a bill, cannot satisfy the same under protest in honor of an indorser, because he as acceptor, is already obliged to him; but the drawee not having yet accepted the bill, may discharge it for honor of the indorser or drawer, as if he were a third person unconcernedⁱ.

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YET

^e Beawes, 457.^f *Id.* 458.^g *Id.* *ibid.*^h *Id.* 459.ⁱ *Id.* 458.

YET it is said, that the possessor of a bill, protested for non-payment, is not obliged to admit of its discharge from a third person *supra* protest either in honor of the drawer or any indorser, unless he declare and prove that the honor of that bill was particularly recommended to him. But if the protested bill be indorsed by the possessor's correspondent, and was remitted by him, then the possessor, if he acts circumspectly, will not admit of any payment in honor of the indorsements, but under the express condition that the payer shall have no redress or remedy against the said correspondent^k.

As promissory notes, which are mentioned in C. V. § 1. par. 4. to be put upon the same footing with bills of exchange, and amongst traders are frequently protested; what has here been said concerning payment of the latter *supra* protest may be applicable to the former.

^k Beawes, 458.

CHAPTER V.

Of Protest.

THE subjects of our preceding chapter having been on acceptances, wherein mention of protest hath frequently been made, with references to this chapter; we shall here first treat on the protest as ordained by the statutes 9 & 10 W. III. and 3 & 4 Ann. and from the determinations of the courts had thereon, shew the use and effect thereof; and attend to the difference subsisting between foreign and inland bills; the use of noting. In § II. treat on the use and effect of the protest as to foreign bills. In § III. on what occasions the protest is to be made, and the notice requisite to be given the drawer or indorser of non-acceptance or non-payment.

§ I. 1. AT common law this difference subsisted between foreign and inland bills, that there was no custom of protesting the latter, so as to subject the drawer to interest and damages in case of non-payment, as there was on the former; to remedy this inconvenience the statute 9 & 10 W. III. c. 17. and afterwards the 3 & 4 Ann. c. 9. were made, which statutes we shall now proceed to take a view of.

By statute 9 & 10 W. III. after reciting that great damages and other inconveniencies frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on inland bills of exchange; it is enacted, “ that all
 “ and every bill or bills of exchange drawn in or dated at and
 “ from any trading city, town, or any other place in the king-
 “ dom of England, dominion of Wales, or town of Berwick
 “ upon Tweed, of the sum of 5l. or upwards, upon any person
 “ or persons of or in London, or any other trading city or town,
 “ or any other place (in which said bill or bills of exchange
 “ shall be acknowledged, and expressed the said value to be
 “ received) and is and shall be drawn payable at a certain
 “ number of days, weeks, or months after date thereof; that,
 “ from and after presentation and acceptance of the said bill or
 “ bills of exchange, (which acceptance shall be by the under-
 “ writing the same under the parties hand so accepting) and
 “ after the expiration of three days after the said bill or bills
 “ shall become due, the party to whom the same are made pay-
 “ able, his servant, agent, or assigns, may and shall cause the
 “ said

“ said bill or bills to be protested by a notary public, and in
 “ default of such notary public, by any other substantial person
 “ of the city, town, or place, in the presence of two or more
 “ credible witnesses; refusal or neglect being first made of due
 “ payment of the same; which protest shall be made and
 “ written under a fair written copy of the said bill of exchange,
 “ in the words or form following:” *Know all men, that I, A. B.*

on the day of *at the usual place*
of abode of the said have demanded
payment of the bill of which the above is the copy, which the
said did not pay;
wherefore I the said do hereby protest
the said bill. Dated at this

“ which protest so made,
 “ shall within fourteen days after the making thereof be sent,
 “ or otherwise due notice shall be given thereof to the party
 “ from whom the said bill or bills were received, who is, upon
 “ producing such protest, to repay the said bill or bills, together
 “ with all interest and charges from the day such bill or bills
 “ were protested, for which protest shall be paid a sum not ex-
 “ ceeding the sum of six-pence; and in default or neglect of
 “ such protest made and sent, or due notice given within the
 “ days before limited, the person so failing or neglecting thereof
 “ is and shall be liable to all costs, damages and interest, which
 “ do and shall accrue thereby.” And herein is contained a
 proviso that in case an inland bill is lost or miscarried, the
 drawer shall give another, whereof we have treated in C. VII. § III.

As this statute could not operate, unless the party on
 whom the bill was drawn, accepted it by underwriting the
 same, which few or none cared to do, it was defective: to re-
 medy which the before-mentioned statute of 3 & 4 Ann. was
 made; whereby it was provided that, in case the party on whom
 an inland bill of exchange shall be drawn, shall refuse to accept
 the same, by underwriting it, or by an indorsement in writing,
 the party to whom payable shall cause such bill to be pro-
 tested for non-acceptance as in case of foreign bills, for which
 protest shall be paid 2s^a. and no more. And that no accept-
 ance of such inland bill shall charge any person, unless under-
 written or indorsed; and if not so underwritten or indorsed,
 no drawer shall pay costs, damages, or interest, unless
 protest be made for non-acceptance, and within fourteen days
 after protest, the same be sent, or notice thereof given to
 the party from whom such bill was received, or left in writ-
 ing at his usual place of abode; and if such bill be accepted,
 and

^a The usual charge of protest in and about duty. But see more concerning this
 London is 5s. whereof 2s. is the stamp hereafter in par. 5.

and not paid within three days after due, no drawer shall pay costs, damages, or interest thereon, unless protest be made and sent, or notice given as aforesaid. Nevertheless the drawer shall be liable to payment of costs, damages, and interest, if any one protest be made for non-acceptance or non-payment, and notice be sent, given, or left as aforesaid.

BUT it is hereby provided that, no such protest shall be necessary either for non-acceptance or non-payment, unless the value be expressed in such bill to be received, and unless the bill be drawn for 20l. or upwards, and that the protest hereby required for non-acceptance shall be made by such persons as are appointed by the statute of 9 & 10 W. III.

AND it is enacted by this statute of 3 & 4 Ann. that, if any person accept such bill of exchange in satisfaction of any former debt, the same shall be esteemed a full payment, if he doth not use his endeavour to get the same accepted and paid, and make his protest for non-acceptance or non-payment. Provided that nothing herein contained shall extend to discharge any remedy that any person may have against the drawer, acceptor, or indorser of such bill.

2. FROM the foregoing relation it appears by whom and how the protest is to be made, and that the statute 9 & 10 W. III. c. 17. gives power of protesting any inland bill of exchange of five pounds or upwards, made payable after date, (in which is acknowledged and expressed the value to be received;) yet this act had no effect, unless the party on whom the bill was drawn, accepted it by under-writing, and therefore by the statute 3 & 4 Ann. c. 9. the same power is given in case the party refuse thus to accept, or to accept it by an indorsement in writing, with proviso that no protest shall be necessary, unless the value be expressed in such bill to be received, and unless the bill be drawn for twenty pounds or upwards.

AND thus having taken a view of those statutes, we come now to treat on the determinations of the courts had thereon with respect to the protest; and here we may observe, that a protest on a foreign bill was part of its constitution; on inland bills a protest is necessary by the statute 9 & 10 W. III. but it was not necessary at common law; and this statute does not take away the plaintiff's action for want of a protest, nor does it make such want a bar to the plaintiff's action; but seems only in case there be no protest, to deprive the plaintiff of *interest* and *costs*, and to give the drawer a remedy against him if he makes no protest.

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As in the case of *Borough v. Perkins*, Mich. 2 Ann. where a writ of error was brought on a judgment by *nil dicit*, in an action against the drawer of an inland bill of exchange, and it was objected that since the act of 9 & 10 W. III. no damages shall be recovered against the drawer upon a bill of exchange, without a protest, and therefore the action lies not, there being no protest. But by Holt, chief justice: The statute never intended to destroy the action for want of a protest, but only to deprive the party of recovering interest and costs upon an inland bill against the drawer, without notice of non-payment by protest: For before the statute there was this difference between foreign and inland bills of exchange; if a bill was foreign, one could not resort to the drawer for non-acceptance or non-payment without a protest, and reasonable notice thereof. But in case of an inland bill, there was no occasion for a protest; but if any prejudice happened to the drawer by the non-payment of the drawee, and that for want of notice of non-payment, which he to whom the bill is made ought to give, the drawer was not liable; and the word damages, in the statute, was meant only of damages that the party is at by being longer out of his money by the non-payment of the drawer, than the tenor of the bill purported, and not of damages for the original debt: And the protest was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a protest, they shall be borne by him to whom the bill is made; and if no damages accrue to him, then there is no harm done him, and a protest is only to give a formal notice that the bill is not accepted, or is accepted and not paid; and if, in such case, the damages amount to the value of the bill, there shall be no recovery, but otherwise he ought not to lose his debt; but that ought either to appear by evidence upon *non assumpsit*, or by special pleading, and the act is very obscurely and doubtfully penned, and we ought not by construction upon such an act to take away a man's right. And the judgment was affirmed by the whole court^b.

In the case of *Powell and Monnier* in chancery, 10 Geo. II. which is described at large in the first section of our preceding chapter, and there shewn that a bill was for satisfaction of a bill of exchange drawn upon the defendant and accepted by him; and pending the suit, the original defendant died, and it was revived against his executors. Here lord Hardwicke being satisfied as to the acceptance; his lordship said, as to the plaintiff's being intitled to interest, I think it a clear case that he is, though no protest has been made; for that it is necessary only to in-

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^b 1 Salk. 131. Lord Raym. 993.

title the payee to damage against the drawer; and all the damages that can be had in such a case is the interest. And his lordship decreed for the defendant to pay the bill of exchange with interest for the same from the time of filing the original bill, at the rate of four *per cent.* and to pay the costs of this suit from the time of filing the bill of revivor.

3. HENCE the use and effect of the protest may be perceived, and that it subjects the drawer to answer in case of non-acceptance or non-payment, but does not discharge the acceptor if the bill be accepted; for the payee, or person to whom payable, hath now two remedies, one against the drawer, and the other against the acceptor^c. Nor does it raise any debt, but only serves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the common law was, and is still necessary on every foreign bill before the drawer can be charged; but it was not required on any inland bill before the statute 9 & 10 W. III. and the want of it since that statute does not destroy the remedy, which the party had before against the drawer, for the principal^d; and it is now only necessary by those statutes to intitle the party to interest and costs.

AND this being the case, protest should always be made either for non-acceptance, or non-payment, which will be no hindrance to proceeding against the acceptor; if the bill be accepted he will be liable to pay interest from the time the bill became payable, and that whether it be protested or not.—As interest is due on all bills of exchange, and notes of hand payable at a day certain, or after demand, if payable on demand^e, the same is in general recoverable with the principal sum from the time the latter became due. And where interest on a bill or note commences from the time of the demand made. If no demand was made till action, the defendant may plead tender and refusal, and *uncore prist*, that is, *that the money was offered at the time and place, and there was none to receive it, and that he is still ready to pay the same*; and so discharge himself of interest; but if it be the defendant's fault that the demand could not be made, as if he were out of the kingdom, the want of demand ought not to prejudice the plaintiff^f. However a neglect to procure protest upon any inland bill, upon which protest might have been made, will preclude the holder from recovering interest or expences from any person intitled to notice of non-acceptance
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^c Molloy, b. 2. c. 10. sect. 17.

^d 3 New Abr. 612.

^e *Blaney v. Hendricks*, C. B. 11 Easter, Geo.

III. 2 Black. Rep. 761.

^f 6 Mod. 138.

or non-payment, as is heretofore demonstrated in par. 1, 2. And hereafter in C. IX. § IV. par. 11, 12. we shall treat further on the costs and expences the plaintiff is intitled to.

4. PROMISSORY notes are by the statute of Queen Anne put on the same footing with bills of exchange; as mentioned in C. II. § III. par. 1. Yet there appears to be no provision thereby made for protesting them in case of non-payment; though it seems that the same privilege might be allowed them as bills of exchange; and amongst traders those notes are frequently protested.

5. IT is observable from what has been mentioned concerning inland bills that, in order to entitle the holder to the benefit of a protest value received must be expressed in the bill, and the same must be for 20l. or upwards, and made payable after date; but with respect to foreign bills there is a difference; for although the statute confines the benefit of protest on inland bills to those payable after date, and it is now determined, as will be seen hereafter, that no protest is allowed on those made payable after sight; yet as to foreign bills there is no distinction in this respect, protest being to be made as well on such as are payable after *sight* as on those payable after date. And although it appears the professed intention of the before-mentioned statutes was, to put the former and latter on the same footing, which they seem to have done relative to recovery of damages, interest and costs, by means of protest; yet by attention to what has been mentioned in C. III. § II. and what will hereafter be related, a difference in many particulars may be perceived. Foreign bills must be protested both for non-acceptance and non-payment; but inland bills in general are only noted for non-acceptance, of which notice must be given, as will be shewn hereafter in § III. par. 3.—It is usual to note an inland bill on the very day of refusal, and then the protest may be drawn any day after by the notary and be dated of the day the noting was made.—Previous to noting the notary presents the bill and demands payment, or acceptance, and the same being refused, he sets his initials, month, day, and year, with his noting charge in the bill; thus, “E. L. Sept. 18th, 1792, 1s. 6d.” If the notary goes without the walls of London, his charge is 2s. 6d. and if any considerable distance 3s. 6d. If the bill is protested 5s. are added—When the notary has demanded payment or acceptance, and the same be refused, before deliver back the bill to his employer, he enters an
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exact copy thereof in his book, and makes a memorandum in writing of the answer he received when he presented the bill; and by this he is enabled to make the protest when it may be requisite. So that noting is a preliminary step towards making the protest if the same should be requisite. However noting is unknown to the law as distinguished from the protest, and is merely a preliminary step, which has grown into practice only in modern times; as will be seen in the case of *Leftley v. Mills*, Hil. 31 Geo. III. wherein divers of the points above touched upon are thoroughly investigated; and as this is a case of importance to bankers and traders in general, we shall relate the same nearly as reported.

THIS was an action by an indorsee of an inland bill of exchange, drawn for 20l. 7s., against the acceptor. The bill was dated the 4th April, 1790, payable fourteen days after sight, and being accepted on the 7th consequently became due, allowing the three days grace, on the 24th, which fell on a Saturday. There was a plea of *non assumpsit*, as to the whole except 20l. 7s. 6d. and as to that a plea of tender. On the 24th, the plaintiff having left the bill at Lockhart's, his banker's, in Pall-Mall, one of Lockhart's clerks called at the defendant's house with the bill, but the defendant not being at home the clerk left word where the bill lay, that the defendant might send and take it up; which not being done before six o'clock, it was noted by another clerk of Lockhart's, who was a notary. Between seven and eight o'clock in the evening, the same person who first went to the defendant's called on him again with the bill, in the character of the notary's clerk, when the defendant offered to pay the amount of the bill, but refused to pay half-a-crown more, which was demanded for the notary. Evidence was given that it was usual to pay 1s. 6d. for noting and demanding in the city, and 2s. and 6d. on the west side of Temple-bar, where this transaction happened. And that by the custom the acceptor of a bill has during the banking hours to discharge it in; but if it be not paid by that time it may be noted; but as to what those banking hours were, no certainty appeared; they were different at different parts of the town. At all events, however, it was admitted, that the second time the clerk called with the bill was after the banking hours. Lord Kenyon was of opinion at the trial at the sittings after last term, that the tender of the amount of the bill at any time on the same day on which it was payable was sufficient; under which direction the jury found a verdict for the defendant.—A rule *nisi* was obtained for setting aside the verdict and granting a new trial, on the ground that 2s. 6d. more, the charge of noting, ought to have been tendered.

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THE counsel in support of the rule argued, that by the custom of merchants on foreign bills, to which this has reference, the protest for non-payment must be made on the last of the three days of grace, it is evident that the debt becomes due and may be demanded on that day; for if the acceptor deny himself on the third day to a bill holder, that is an act of bankruptcy; which can only be by denial of one who is then an actual creditor. *Colkett v. Freeman* [2 Durnf. & East, Rep. 59.] If in that case the bankrupt instead of denying himself had refused payment, the holder might have sued out a writ against him. So here, if, instead of noting the bill, the plaintiff had sued out a writ he would have been justified in refusing the subsequent tender without the expences of the writ.

LORD KENYON, chief justice. The question here is on what day, and at what time the defendant was bound to pay this bill. According to the nature of the contract, the acceptance was an undertaking to pay the bill on the last of the three days of grace. Now unless there be something in this case to distinguish it from other contracts, it must be governed by the same rules. In the case of mortgages, bonds, and a variety of other instruments, whereby parties oblige themselves to the performance of certain duties, as to pay money within a certain time, we find the rule to be, without any exception, that the party bound has till the last moment of the day to deliver himself from the obligation by paying. The first case in point of time is that of *Hudson v. Barton*, 1 Rol. Rep. 189; where Lord Coke said, that a debtor is not bound to pay till the last hour of the day; and though Haught, J. seemed to differ from Lord Coke, that difference was applicable to another part of the case. Lord Hale also in *Kabel v. Vaughan*, 1 Saund. 287, was of this opinion, and said that rent was not due till the last instant of the day. Moor 122. pl. 166; and Salk. 578, are to the same effect, and I find no authority to the contrary; therefore the law must be the same here as in other cases. It may be said that there is a difference in the law as applicable to contracts and forfeitures; but it is better there should be one general and invariable rule for all cases, and adapted to the understanding of all men.—There could be no protest of an inland bill of exchange before the statute of William; and that statute only gives a protest upon bills payable at a certain number of days after date, whereas this bill is payable 14 days after sight, upon which the statute does not attach. And even in cases to which that statute does apply, it says expressly that the holder may protest the bill

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bill *after the expiration of three days* after the bill becomes due; then it is that the power to protest arises, but here the plaintiff noted the bill (which is a preliminary step to the protest) before that time. The acceptor in this case undoubtedly was obliged to go to the holder of the bill when it became due; and if he did not at that time tender the amount of the bill, the holder might have commenced an action against him without demanding payment: but in this case the acceptor tendered the money within the time allowed him by the law. And if we were driven to the necessity of considering the amount of the tender under the statute, in point of fact there was a tender of 6d. which is the exact sum given by the statute in the case of protesting inland bills of exchange. Therefore, in every view of this case, I am of opinion, that the defendant did every thing that the law required of him, and that the plaintiff is not entitled to recover.

JUSTICE ASHHURST. This is so clear on the act of parliament, that it is not necessary to add any thing to what my lord has said.

JUSTICE BULLER. As to the event of this rule, I most thoroughly concur in opinion with the court. But I cannot refrain from expressing my dissent to what has fallen from my lord, respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent, or any of the other cases mentioned by my lord, cannot, I think, apply to this case. But one of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is, to pay the bill *on demand on any part of the third day of grace*; and that rule is now so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree, that the protest must be made on the last day of grace: now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour: but on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded till sun-set;

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and if so the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town. However, this consideration need not be further pursued for the determination of this case. For this rule must be discharged in whatever view it is considered. Even if this had been a foreign bill of exchange, there would have been no pretence for the demand which the plaintiff made. It was properly said by one of the witnesses, that the fees of the notary are for *noting and demanding*. In making a protest there are three things to be done; the noting, demanding, and drawing up the protest. The noting is unknown in the law, as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years. But in this case the notary's clerk made a note on the bill merely for his own convenience; only to save himself trouble, in the same manner as banker's clerks frequently write on the bill "received the contents," even before they go out of their master's office; and which words are afterwards struck out, if the bill be not paid. The next and the material part, is the making of the demand: the party, making the demand, must have authority to receive the money; and in case that is refused the drawing up of the protest is mere matter of form; but if the person on whom the demand is made, be ready to pay the amount of the bill, he does all that the law requires of him. Therefore, if this had been the case of a foreign bill of exchange, the defendant would not have been liable to pay the fees of protesting, because he was ready to pay when the demand was made. It is material too to consider by whom the demand was made in this case; I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public; to whom credit is given, because he is a public officer. However, in this case there could be no protest at all: It is clear that, at common law no protest was required on an inland bill of exchange; it is only made under the statute of William, which does not apply to this case, for the reasons already given.

JUSTICE GROSE, agreed with the court on the construction of the statute; but declined giving any opinion on the other point, as unnecessary to the decision of this case.—Rule discharged &c.

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By this decision it is perceivable that the provisions of the 9 & 10 W. III. c. 17. respecting protest of inland bills, do not apply to such as are made payable *after sight*, and therefore an acceptor of such bills, who refuses payment on the third day of grace, is not liable to *any* charge for noting the same. But whether the acceptor of an inland bill is bound to pay it on demand, at any reasonable time of the third day of grace, or whether he is allowed the whole of that day to pay it in, seems undetermined.

§ II. 1. PROTEST on foreign bills of exchange is absolutely necessary to intitle the party to recover against the drawer, not only interest and cost, but likewise the principal sum^h. If the protest be made before a notary public, in case of non-acceptance or non-payment, all foreign courts give credit thereto; and the protest is evidence that the bill is not paid; but in England the bill itself as well as the protest must be shewn, because the whole declaration must be proved, which cannot be without giving the bill in evidence^(b).—When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill run for.—In case of foreign bills of exchange, the custom is, that three days are allowed for payment, and if not paid on the last day, the party ought to protest the bill and return it, and if he does not, the drawer will not be chargeable; but if the last of the three days be a Sunday, or great holiday, he ought to demand the money on the second day, and if not paid, protest it on the same day, otherwise it will be at his own perilⁱ.

2. THE bill must be protested to render the drawer liable; for noting in the case of a foreign will not be sufficient. A. drew a bill of exchange in the West-Indies, on T. in London, at sixty days sight, to W. or order; W. indorsed to G. who presented the bill to T. who refusing, G. noted it for non-acceptance, and at the end of sixty days, protested it for non-payment, and then wrote a letter to A. and also to his agent in the West-Indies, acquainting them that the bill was not accepted. In an action brought against A. by G. on this case, he was non-suited; for by not sending the protest for non-acceptance, he made himself liable^k. And where a foreign bill of exchange payable forty days after sight was refused acceptance, and an action brought in order to charge the drawer, it was

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held

^h Molloy, B. 2. c. 10. sect. 17.

^(b) Gilbert's Law of Evidence, 119.

ⁱ Law of Nisi Prius, 270. Edit. 1785.

cites 1 Raym. 743.

^k Goofry and Mead, West. 1771. Law of Nisi Prius, 270. Edit. 1785.

held that proof of the noting of the bill alone for non-acceptance was not sufficient, without proving that it was also protested for non-acceptance, though there be a subsequent protest for non-payment¹.

3. WHEN a foreign bill of exchange is protested for non-acceptance, it must be kept till due, and the protest only sent to the drawer, which will oblige him to find security for the payment: but if for non-payment, both the bill and protest must be returned, in order to recover the contents with costs^m.—In case of a person's refusing payment of his accepted bills when due, they ought to be protested, and sent with the protest to the remitter or drawer, which of the two it was that forwarded them, except they should order their correspondent to retain the bills, with a prospect of obtaining their discharge from the acceptorⁿ.—No drawer or indorser is obliged to make restitution on sight of the protest alone; nor where one of a set has been accepted, on sight of the protest and unaccepted bill; but he is obliged to give a satisfactory security to the remitter on his producing only the protest, and to make payment when this and the accepted bill are presented together^o.

§ III. 1. AS to when and on what occasions the protest is to be made, being in some respects shewn in the preceding sections, and divers instances thereof in the first, eighth, and tenth sections of the preceding chapter; in the eighth section whereof we mentioned that, when a bill of exchange is drawn, it is usually presented soon after to the drawee for acceptance, and if the bill when left for acceptance, should happen to be lost or mislaid, what in such case is to be done. Here we may observe that the drawee must be desired to accept the bill before there can be a protest for non-acceptance; but if he be dead, or cannot be found, these are good causes for protesting the bill, either for non-acceptance or non-payment, such due diligence having been used to find him, as hereafter treated on in C. VIII. § I. If after acceptance the drawee dies, there is to be a demand of his executors, or administrators, and in default of payment a protest; and in case the money becomes due before an executor or administrator can be appointed, yet this delay is sufficient cause to protest the bill^p.

2. IF he to whom the bill is to be paid, dies, there can be no protest before a probate of his will, or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently

¹ *Rogers v. Stephens*, Mich. 25 Geo. III.

² *Durnf. & East*, Rep. 713.

^m *Gordon's Universal Accountant*,
2 V. p. 355.

ⁿ *Beaves*, 460. 4 Edit.

^o *Ibid.*

^p 3 *New Abr.* 612.

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no other person can sue for or demand the same; and though security be offered to indemnify the drawee against the executors, yet he is not obliged to accept thereof, being a matter left entirely to his consideration, to judge and determine on the sufficiency of such security; and in this case it is said, that if a publick notary protest the bill, an action on the case lies against him⁹.

3. As to non-acceptance; where a bill has been presented for acceptance, which hath been refused, or where the drawee be dead, or cannot be found, those, as we have before mentioned, are good causes for protesting the bill, the use and effect whereof, we have heretofore treated on in our two foregoing sections; and from the first it is perceivable that, the protest on inland bills is required to be sent, or notice thereof given within fourteen days after the same are protested; but as to the fourteen days further mention will presently be made. With respect to foreign bills, in the preceding section, we have seen that the protest of those must be sent to the drawer, and by the next post after the same are protested.

As to non-payment, we have seen in our first section of this chapter that, if protest on an inland bill be made for non-payment, the same must be sent to the drawer, or notice thereof given him within fourteen days after; but as concerning those fourteen days mentioned in the statutes of William and Ann. within which time it is said the protest must be sent or notice given; it seems indisputably clear that, if no notice of non-payment by the acceptor, were given to the drawer before that time, he would be discharged by the negligence of the holder, and that notice must be given, to such of the parties who reside in the same place where presentment of the bill was made, before the expiration of the following day of which payment was refused; and to those who reside at a distance by the next post. So in like manner where the bill hath been presented for acceptance, which hath been refused, no delay should be in giving notice thereof^r.

HENCE may be observed, that no delay should be in giving notice of the non-payment of a bill; and herewith correspond the subjects of our eighth chapter just now referred to; in the first section of which we have treated on the time when and place where, presentment of a bill or note is to be made, and in the following sections related the most recent determinations of the courts, on making demand and giving notice of non-payment and non-acceptance, concluding the chapter with hints, by way of reminding the reader concerning the protest, and the time

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wherein

⁹ 3 New Abr. 612.^r See Chap. VIII. § III. § IV. § V. § VI.

wherein it appears that notice must be given of a bill being dishonoured.

AND now we shall conclude this chapter with attention to what is said concerning protest for better security; as that the custom of merchants is, that if a merchant who hath accepted a bill of exchange, shall happen to be insolvent, or is publickly reported to be failed in his credit, or absents himself from the exchange before the accepted bill be due; the holder may cause a notary to demand better security, and in default thereof make protest, which is to be sent to the drawer or remitter by the next post^s.

CHAPTER VI.

Of Indorsements.

IN C. II. § iv. par. 3. we have seen that bills of exchange and promissory notes, where the sum therein expressed amounts to 5l. or upwards, may be assigned from one to another, *in infinitum*, either by a blank or general indorsement, as by the payee or indorsee writing his name on the back thereof; or, by a full indorsement, as by directing it to be paid to the bearer or another person by name; from whence, and the subjects of this chapter may be perceived, the law hath not appointed any set form of words as necessary to this assignment, only that it must be in writing; for that a bill or note made payable to order, can be transferred by no other method, as heretofore demonstrated in page 31.; yet otherwise it is with respect to a bill payable to bearer, which is transferrable by delivery, or, may be indorsed, as shewn with the effect thereof in C. III. § v. And, as by whom this indorsement must be made, will be treated on hereafter in § vi. we shall here, in our first section, treat on what is necessary to be attended to in making it. In § ii. on the negotiability of a bill restrained by indorsement. In § iii. on that the indorsement must be for the whole sum drawn for. In § iv. on writing an indorsement on a blank note or check. In § v. on indorsement made on bills and notes drawn payable to bearer. In § vi. on who may indorse, as above hinted. In § vii. shew, that a bill drawn by two, not being in partnership should be indorsed by both.—That in partnerships, the act of one partner will bind the rest.—What constitutes a partnership, and how partners may be sued.—That power given to one partner on dissolution of partnership, does not authorize him to indorse a bill in the name of the partnership.—That a special

* Marius, 111. Ld. Raym. 742.

cial agent, under a limited authority, cannot bind his principal by any act beyond the scope of such authority.—And that an indorsement may be made after a bill becomes due, will be shewn in C. VII. § II. par. 10.

§ I. AS concerning what is necessary to be attended to in making the indorsement, it may be observed that, although the law hath not appointed any set form of words as necessary hereto, yet attention to the making hereof is very necessary to be had, much litigation having been occasioned, by particular indorsements; and therefore, where the negotiability of a bill is not intended to be restrained by indorsement (concerning which we shall treat in our ensuing section) a blank or general indorsement is the most safe and proper, as clearly demonstrated in *Edie and Laird v. the East India Company*, which we shall presently relate; after mentioning that, it hath been common to indorse with a full indorsement, as pay, &c. to indorsee or order. And where a bill of exchange was indorsed in this manner: *Pay the contents of this bill unto the order of J. S.* who brought his action as indorsee, averring he had made no order to any body to receive the money; and on demurrer it was objected, that J. S. could not maintain an action; because the indorsement was not to him, but to his order: But the court held the action well brought against the indorser; and that, amongst tradesmen, this form of indorsement is commonly used, although it is intended to be made payable to the person, whose order is mentioned^a.

IN the case of *Edie and Laird v. the East-India Company*, King's Bench, Trin. 1 Geo. III. it was determined that a bill payable to A. or order, and indorsed personally to B. may be afterwards indorsed by B. to another. In this case an action was brought on two bills of exchange, of 2000l. each, drawn by R. Clive on the East-India Company, at three hundred and sixty-five days after date, payable to R. Campbell, *or order*. Campbell indorsed one to Ogleby, *or order*, the other to Ogleby, without adding the words, *or order*. But at the trial, the words *or order* appeared upon the indorsement in another hand writing. The East-India Company accepted both bills. Ogleby then indorsed them to the plaintiffs, and soon after became insolvent. The company then refused payment. The jury found a verdict for the plaintiffs on the first bill, but for the defendants on the second; apprehending, that by the usage of merchants it was not assignable without the words *or order* in Campbell the payee's indorsement.

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^a 3 New Abr. 609.

THE plaintiff not being reconciled to this verdict found on the second bill, moved the court for a new trial. 1st. Because the bill, being once negotiable, could not lose its negotiability by Campbell's writing some words and omitting of others. 2d. On the footing of surprize; the plaintiff not being prepared to give evidence of the custom of merchants; and the evidence given by defendants being not of facts, but merely of opinion. And having obtained a rule to shew cause why there should not be a new trial; after arguments by counsel on both sides, the court delivered their separate opinions.

LORD MANSFIELD, chief justice: There can be no dispute where the indorsement is in blank. There you may write over it whatever you please. And it has been permitted to be done even in court. But for this there is no occasion. Every thing shall be intended upon such a blank indorsement. The point relied on at the trial for the defendants was, that where a special indorsement was made to A. B. and the indorser omitted the words, *or order*, this was equivalent to the most restrictive indorsement. Many witnesses were examined by defendants to prove this usage; but it did not appear that in any one fact, the indorsee of such special indorsement, ever lost the money by such omission. The evidence was only matter of opinion.—I told the jury, that upon the general law (laying usage out of the case) the indorsement carried the property to Ogleby; and that the negotiability was a consequence of the transfer. But if they found an established usage among merchants, that where the words, *or order*, were omitted, the bill was only negotiable on the credit of the indorsee, they should find for the defendants. If otherwise, or they were doubtful, then either for the plaintiffs, or make a case of it. They found for the defendants on the bill in question; for the plaintiffs on the other, concerning which there was no dispute.

Now, upon the best consideration I have been able to give this matter, I am very clear of opinion, that at the trial I ought not to have admitted the evidence of usage. But the point of law is here settled: and when once solemnly settled, no particular usage shall be admitted to weigh against it. This would send every thing to sea again. It is settled by two judgments in Westminster-Hall, both of them agreeable to law and convenience. The two cases I go upon, are *Moore* and *Manning*, in Comyns [311], and *Acheson* and *Fountain* in Strange [557]. These cases go upon a general proposition in law, that an indorsement to A. implies *or order*, and is negotiable.—The main foundation is, to consider what the bill was in its origin. The present bill in its original creation, was not a bare authority,

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but a negotiable draught. There are no restrictive words in it. And whatever carries the property, carries the power to assign it.—It were absurd, if the merchants opinion should prevail, that this is now converted into a personal authority. If it be such, and the indorsee dies, it could not go to his executors and administrators; in whom most clearly the property of the bill does vest.

UPON this ground, that the point is settled both by King's Bench and Common Pleas, and well settled, I think there should be a new trial. Otherwise also, I should be of the same opinion. Certainly, the suggestion of surprise, is not in all cases a reason for a new trial; but in particular cases, such as the present, it may be.—The question of costs is very peculiar. There is a verdict in part for the plaintiff, which already carries costs for him. But for form's sake we must set aside the whole verdict, which is usually done on payment of costs. But this will be giving defendants costs, which they could not otherwise have, merely because they have obtained an improper verdict. Therefore, I think, that under these particular circumstances, the verdict should be set aside without costs.

JUSTICE DENNISON: I am of the same opinion. If the words to A. B. only were inserted, I should think it would not be restrictive: at least it should be left to a jury. In *Rawlinson and Stone*, M. 20 Geo. II. an inland bill of exchange was drawn payable to A. or order, who indorsed it to B, without adding any more. The question was, whether there was such an interest in the executor of the assignee, as that he might assign it. The court held, upon inquiry from merchants, that it might be indorsed thus: "C. executor or administrator of "B." when a man says, "pay to A." the law says, it is "to "A. or order." He then says, I intend it should not be so. What signifies what you intend? The law intends otherwise^b.—Where a bill is originally made payable to A. or order, it is of course, and in its very essence negotiable from hand to hand. An inland bill of exchange is assignable in its nature *toties quoties*^c, and promissory notes are now upon the same foot with them. Foreign bills of exchange are equally so by the law of merchants and by the settled determinations of the courts of law in England^d.

JUSTICE FOSTER: I am of the same opinion. This is now the settled law, and ought not to have been left to a jury. People talk of the custom of merchants. This word custom is apt to mislead our ideas. The custom of merchants, so far

^b 1 Black. Rep. 295.

^d Burr. Rep. 1216.

^c Explained heretofore in C. II. § 1. page, 18. n.

far as the law regards it, is the custom of England; and therefore, lord Cook calls it, very properly law-merchant. We should not confound general customs with special local customs.

JUSTICE WILMOT: There are two questions. Whether the law is fully settled, and upon what principle? It is certainly now settled, and upon those principles. The original contract between the drawer and payee, is to pay to the payee and his assigns, and the assigns of such assigns, *in infinitum*. There is the same privity between the drawer and the last assignee, as the first. The first assigns over that *chose in action*^e, which, in its nature, and by the express permission of law, is assignable, with the same privileges and advantages that it had when he received it. It might be a considerable question, whether a man can limit and modify the property or not, even by express words of restriction, so as to check its currency. By giving a bare authority he may do it; as "pay to A. for my use." [1 Atk. 249.] But if he indorses it generally I should have a doubt; supposing it purchased by an indorsee for a valuable consideration. In the present case, I think assigning it to A. carries the property with all its qualities. It implies a consideration to have been given.—The learned judge after some further relation as in corroboration of what he had delivered says, custom of merchants is the general universal law. Facts must be reiterated to make such a custom. The opinion of merchants is nothing. Special custom of merchants has been controlled in a case, where an indorser had divided a note and indorsed it to several persons. [the case alluded to is related hereafter in § III.]—The whole court being unanimous, a new trial was granted without payment of costs^f.

§ II. CONCERNING the negotiability of bills restrained by indorsement, of which mention has been made in the latter part of the preceding section, from whence may be perceived, that by only giving a bare authority as "pay to A. for my use." an indorsement may be restrictive, and operate so as to preclude the person to whom it is made from transferring the instrument to another, or having a right of action, either against the person imposing the restriction, or against any of the preceding parties. And where a bill was drawn by K. A. on C. H. payable to J. M. and J. M. by indorsement directed, that "the within must be credited to M. D. value in account." This was held not to be a transfer of the bill to M. D. but only an authority to the drawees to give him credit for the amount of the

^e Explained heretofore in C. II. § IV. par. 2.

^f 1 Black. Rep. 295.

the bill; and the drawees accepting the bill, instead of cancelling it, and an indorsement being forged and the bill negotiated, a party who advanced money thereon must sustain the loss; and though a friend of the drawer, by mistake, pay the bill for his honour, the drawer may recover back the money, as it was the negligence of the party advancing money on the bill not to read the special indorsement, he must suffer for his negligence.

THIS was the case of *Ancher v. the Bank of England*, Easter, 21 Geo. III. which case was as follows: One captain Dahl, a Dane, and resident in Denmark, being indebted to the house of Claus Heide and Co. in London, applied to one Mæstue, to procure him a bill from the plaintiffs at Christiana, on Claus Heide and Co. with whom they had a correspondence; which bill was as follows:—"Christiana, 17th January, 1778. "Two months after sight, please to pay this, our sola bill of "exchange, to Mr. Jens Mæstue, or order, one hundred and "twenty pounds sterling, value in account, and place it to "account, as per advice from Karen, widow of Christian Ancher, and sons.—To Messrs. Claus Heide and Co. London." On this bill was written by Mæstue, an indorsement in the Danish language, of this import:—"The within must be credited to captain Morten Larsen Dahl, value in account. "Christiana, 17th January, 1778, Jens Mæstue."—And it was remitted to Claus Heide and Co. in the following letter:—"Agreeable to the desire of captain Morten Larsen Dahl of "Arendal, I have inclosed for his account, sent you Karen Ancher "and son's bill, on yourselves, for 120l. which you will, on "receipt, be pleased to credit his account with, and advise "him of the same."—The bill was received by Claus Heide and Co. and accepted, and they gave notice to the plaintiffs, and to Dahl, that they had received it, and placed it to his account. Afterwards a forged indorsement in English, was written upon it as follows:—"For me, to pay Mr. Detleff "D. Muller, or order. Morten L. Dahl."—Muller, who was a clerk in the house of the acceptors, carried the bill, thus indorsed, but which had never been in the hands of Dahl, to the bank, and indorsed it with his own name, upon which it was discounted, in the ordinary course of business. When the day of payment came, the acceptors having become insolvent, and Muller having absconded, the bill was protested; and one Fulberg, as a friend or agent for the plaintiffs, came to the Bank, and paid it for their honour as the drawers; but, the forgery having been discovered, this action for money had and received was brought against the bank, on the ground that the bill was not negotiable on account of the special indorsement, and that
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it had, therefore, been discounted by the Bank in their own wrong, and the money paid by Fulberg, to take it up, paid by mistake.

THIS cause being tried at Guildhall, before lord Mansfield, at the sittings after last term, his lordship directed a nonsuit: and now it came on in court, on a motion for setting aside the nonsuit, and granting a new trial, and hereon, after the counsel had closed their arguments, the judges delivered their several opinions.

LORD MANSFIELD: The ground of the nonsuit was, that the purpose for which the bill was drawn was answered, it having been applied to the credit of Dahl, and he having acquiesced. It therefore occurred to me, that the drawers had received no injury, and had no interest. But, (which was not attended to at the trial) there has been a second payment for the honour of the plaintiffs, and it is contended, that a consideration has arisen on the second payment. Where there is equal equity possession must prevail; and the equity is equally between persons who have been equally innocent and equally diligent. The question therefore is, whether the Bank has been equally diligent. A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined upon argument. A blank indorsement makes the bill payable to bearer, but, by a special indorsement the holder may stop the negotiability. Mæstue did so here. It does not seem to me, that, after the special indorsement by Mæstue, Dahl himself could have indorsed it over. Mæstue did not mean to make himself answerable as indorser, or to enable Dahl to raise money on the bill. The Bank could not have maintained an action on the bill, against the plaintiffs. It was their negligence not to read the special indorsements.

JUSTICE WILLES: I am of the same opinion. The question is whether the negotiability is not restrained by the indorsement; and I think it is. The Bank either did read, or ought to have read the indorsement. The only doubt is, what shall be the effect the bill's having been taken up by a third person; but I think he must be taken to be the agent of the plaintiffs.

JUSTICE ASHHURST: I am of the same opinion. The question is, did the Bank use due diligence? If they had attended to the indorsement, they would not have discounted the bill. I think Dahl himself could not have indorsed it. It was never the intention that Claus Heide & Co. should pay the money to Dahl, but only that the money should be set off in his account. If the bank have taken a bill not negotiable, it is their own fault, and they are not entitled to retain the money which has been paid them by mistake,

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JUSTICE BULLER : I have the misfortune to differ from the rest of the court. As to the forgery, it was decided in the case of *Price v. Neale*, [related in the sixth section of our seventh chapter] in this court, that if a forged bill has been taken up, the money shall not be recovered back from an innocent indorsee. Therefore, as against such an indorsee, the forgery is not material. As to the indorsement by Mæstue, it amounts to an indorsement to Dahl, and makes him the proprietor ; and, the bill being originally negotiable, it seems to me to have continued so. What is called a restrained indorsement, *viz.* that the bill was to be credited to Dahl, appears to amount to the same thing as "Pay to Dahl." The words "or order" are omitted, but it has been determined, that such omission does not stop the negotiability of a bill. The circumstance, that there was an account between Dahl and the drawees, cannot affect third persons who knew nothing of that account. But if the bill was only meant to pay the drawees, why was it not cancelled by them when they received it ? Why did they accept it ? Did not that hold out negotiability to the rest of the world ? This is an answer to any supposed negligence in the defendants. Besides, if the bill was not meant to be negotiable, why did the plaintiffs take it up ? That was done by another person, as it is said, for their honour ; but they have by bringing the action adopted this act.

LORD MANSFIELD: The whole turns upon the question whether the bill continued negotiable. As the case stands at present, let the non-suit be set aside, but we will consider of it farther, and if we alter our opinions we will mention it.—This case was never mentioned any farther. The rule was made absolute, and the cause again tried, at the ensuing sitting, before lord Mansfield, when the jury by his lordship's directions found a verdict for the plaintiffs^a.

§ III. INDORSEMENT must be for the whole sum drawn for. A bill of exchange cannot be assigned over for a payment in part, so as to subject the party to several actions^b. And where the defendant had given a note under his hand to pay unto E. G. or order a certain sum of money. E. G. by indorsement on this note, ordered part of the money to be paid to the plaintiff. Upon which an action was brought ; and a special custom amongst merchants was laid in the declaration, according to the plaintiff's case. Upon a demurrer to this declaration it was adjudged that this is a void custom ; because by means of such division, the defendant would be subject to as many

^a Doug. Rep. 637. 2 Edit.

^b Law of Nisi Prius, 271.

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^a Doug. Rep. 637. 2 Edit.

^b Law of Nisi Prius, 271.

many actions, as the person to whom the note was given should think fit; and this upon a single contract subjected him to one action only^c.

§ IV. INDORSER writing an indorsement on a blank note or check, may be bound for any sum and time of payment which the person to whom he intrusts the note chooses to insert in it; as in *Russel v. Langstaffe*, Mich. 21 Geo. III. Where one Galley having had frequent money transactions with the plaintiff, who was a banker, and having over-drawn his cash account, the plaintiff, suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve. Upon this Galley applied to the defendant, and he indorsed his name on five copper-plate checks; made in the form of promissory notes, but in blank, i. e. without any sum, date, or time of payment, being mentioned in the body of the notes. Galley afterwards filled up the blanks with different sums and dates, as he chose, and the plaintiff discounted the notes. One of them was made payable on the 22d of September, two on the 27th of September, and two on the 4th of October. These notes not being paid when they became due, the plaintiff on the 4th of October, called upon the defendant, as indorser, for the payment of all of them, and upon his refusal, brought this action, which was tried before baron Hotham, at the last assizes for the county of Durham. It appeared that Galley had become a bankrupt on the 20th of September, and that, on the 27th, the defendant had been present at a meeting of his creditors. It also appeared, that Russel knew the notes were blank at the time of the indorsement. The plaintiff and the defendant lived in the same town.

FOR the defendant at the trial, it was objected, 1. That these notes being blank at the time of the indorsement, they were not then promissory notes, and that no subsequent act of Galley could alter the original nature or operation of the defendant's signature, which, when it was written, was a mere nullity. It was also objected, 2. That the notice of the non-payment by the drawer, was not given soon enough to the indorser. And the judge being of opinion with the defendant on the first point, he directed the jury accordingly, and they found a verdict for him.

BUT a rule being obtained in this term to shew cause why there should not be a new trial; this case was now argued, whereon

whereon Mr. Lee, one of the defendant's counsel, on the first point argues, that, the copper-plate checks in this case, without sum or date, were mere waste paper, and Langstaffe's name upon them had no more effect than if written upon any other blank piece of paper. That an indorsement supposes a bill or note, then actually existing, and if a party takes an indorsed bill or note, *knowing* at the time, that it was not the subject of an indorsement, when the name was written on the back of it, he is not injured, *if* he is afterwards told, that he shall not be permitted to treat it as a bill or note. That the very declaration in this action, necessarily states a pre-existing note, previous to the indorsement; and such forms are not to be considered as useless and without a meaning. On the second point, defendant's counsel argues that, proper notice was not given of non-payment of the bills; and said it was well established, that such notice ought to be as early as possible. That, where the parties live at a distance, the notice ought to be given by the first post, though if any thing delay the going out of the post at the usual time, that will be an excuse; but that, here, the parties lived in the same town, and no notice had been given till ten days after the time of payment, even in the case of the notes payable in October. As to the bankruptcy, it had been frequently ruled by lord Mansfield, at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer, or acceptor, has become a bankrupt; as many means may remain of obtaining payment, by the assistance of friends or otherwise.

MR. DUNNING, plaintiff's counsel, states, that the jury on the second point were clearly with the plaintiff, and that they had found a verdict for the defendant, in deference to the judge's opinion on the other question. As to that question, he insisted that there could not be a doubt, but the direction was wrong. It strengthened the plaintiff's case, that he knew the notes were blank when indorsed. For what purpose could he suppose the indorsements were made by the defendant, but to authorize Galley to fill them up with any sum he pleased, and to bind himself as his security to that extent. The declaration states the notes to have been made before the indorsements; so all declarations against indorsers must; but the defendant, by indorsing them concludes himself from contending or proving, that they were not filled up when he signed them.

LORD MANSFIELD: There is nothing so clear as the first point. The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, "Trust Galley to any amount, and I will be his security." It does not lye in his

his mouth to say, the indorsements were not regular. The direction having been wrong on this point, it is needless to go into the other.—Hereon the rule for a new trial was made absolute. But before there was an opportunity for a new trial, another action between the same parties, and under similar circumstances, came on before lord Mansfield, at Guildhall, and, a verdict being found for the plaintiff, the defendant submitted to this action, without going to a second trial^a.

THAT although a note given by a wife to a husband is void; yet if indorsed over by the husband as between him and the indorsee, it is good; and that if a note was drawn by an infant and indorsed over, the indorser is liable on his indorsement; and that an indorser is bound by his indorsement, though a bill be made to a fictitious payee, or if it be a mere nullity in other respects, hath been heretofore shewn in C. III. § iv.

§ v. AS to the indorsement on bills and notes drawn payable to bearer, whereof we have treated in C. III. § v. It hath formerly been held, that those were not negotiable or assignable, so as to enable the indorsee to bring an action if the drawer refused to pay; yet the assignment was held good between the indorser and indorsee, and that the indorser was liable to an action for the money^b. But now it is held, that bills payable to bearer, are negotiable like other bills of exchange, and the holder may maintain his action against the drawer; as in *Grant v. Vaughan*, Trin. 4 Geo. III. The defendant 22d October, 1763, drew a bill in London, on Sir Charles Asgill and Co. for 70l. payable to *Ship Fortune, or bearer*, which he gave to Mr. Bignell, the ship's husband, who lost it. It was found by a person unknown; who, on the 25th of October, paid it to the plaintiff, a grocer in Portsmouth, for a parcel of teas, and took the change; having first made inquiry, and found that the drawer was a responsible person. In the mean time, Vaughan directed Sir Charles Asgill to stop payment of this bill; which produced an action, on which a special jury of merchants at Guildhall found a verdict for the defendant. And now, Norton, attorney-general, moved for a new trial.

LORD MANSFIELD, who tried the cause, reported that he left two questions to the jury. 1. Whether the plaintiff came by the note, *bona fide*, for a valuable consideration; as to which there was no dispute. 2. Whether in the course of trade, such drafts payable to bearer, were usually negotiated from hand to hand. No evidence was given to found this verdict upon, or to shew a distinction between this and other bills of exchange.

MORTON

^a Doug. Rep. 514. 2 Edit.

Horton and Coggs, 3 Lev. 299.

^b Case of *Hodges and Steward*, Easter, 5 W. & M. 1 Salk. 125.

MORTON, Eyre, and Wallace, counsel for the defendant, insisted, that this note was no bill of exchange, but merely an authority for the ship's husband to receive the money. That draughts payable to bearer, are not intended to be negotiable. And that by the old cases reported in Salkeld and Levinz, [above cited] and the case of *Morris and Lee*, lord Raymond's Reports, 1397, the draught must be payable to order, to make it negotiable; and not to bearer only. And after the counsel had closed their arguments, the court delivered their separate opinions.

LORD MANSFIELD, chief justice: I shall always be more happy in acknowledging an error and correcting it, than in maintaining and persisting in it. I therefore, with great pleasure, take this opportunity to declare, that I am now convinced I mistook in the directions I gave the jury, as the case came on by surprise, and I had no time to consider it fully.— Upon general principles I was struck, and continue still of the same opinion, that since millions of property are vested in this kind of bills, it is unjust not to put them upon the same footing as common bills of exchange. When I left this matter to the jury, I did think that I had only left a plain fact, as clear as, whether there be such a thing as the bank of England. But I ought not to have left it on the footing of the usage; it being a question of law only, whether such bills are or are not negotiable: and this question, perhaps, the jury understood to be left to them; whereas I only meant to leave it thus; whether in fact such bills had usually been negotiated.

I think (upon the merits) all the cases in King William's time are founded on mistaken principles. The first struggle of the merchants, (which made Holt so angry with them, *Ld. Raym.* 758.) to make inland bills of exchange in the nature of specialties, and to declare upon them as such, was certainly wrong on their parts; as it was admitted they might declare on general *indebitatus assumpsit*, and give these bills in evidence. But the reasons given by the judges, why no action can be brought by the holder of such a bill, payable to bearer, are equally ill-founded.

FIRST, it is said, they were never intended to be negotiable; *cujus contrarium est verum*. [of which the contrary is the truth] For when payable to A. B. or bearer, they are clearly intended to be transferred in the most easy manner, even without indorsement. Also, it is said, that dangers will arise, if upon a casual loss, the finder becomes intitled (as bearer) to maintain his action for it. But the bearer must shew it came to him, *bona fide*, upon valuable consideration: And then, there is no
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more danger here than in losing an indorsed bill of exchange, made payable to A. B. or order. It is also said, that the action might be brought in the name of the person to whom it is first payable. In this very case it could not. Can an action be brought in the name of Ship Fortune? Many bills are payable to bearer only, without inserting any person's name. And if payable to A. B. or bearer, A. B. may not be found, may refuse to lend his name, may release, may become bankrupt, &c. which would put the bearer's property on a very precarious footing.—Besides this would be giving a third person, (the drawee) an option whether he will pay it to the bearer or no; which may be abused to unjust or corrupt purposes.

IN Hinton's case, 2 Show. 235, in the latter end of Charles the Second's time, it is taken for granted, that such bills are recoverable by the bearer, if he comes to them *bona fide*. To this succeeded all the cases in King William's time, which adopt the other erroneous principle, and in all these there is great confusion; for, without searching the record, one cannot tell whether they arose upon promissory notes, or inland bills of exchange. Yet in equity, (2 Freem. 258.) it was even then held, that a bill payable to A. or bearer, was like so much money paid. Whatever transactions may be between A. and the drawer of the bill, the bearer shall have his whole money. And in Salkeld, 126, Holt held, that if a bank note be lost payable to A. or bearer, and a stranger, who finds it, transfers it to C. for good consideration, trover will not lie against C; because by the course of trade, there is a property in the assignee or bearer.

THE statute 3 & 4 Anne, c. 9. subsequent to these cases was made, to put promissory notes, in all respects, upon the same footing as inland bills of exchange. The statute expressly provides for notes payable to bearer; and therefore it may reasonably be construed to suppose, that such was the law for bills also; for else it would make a promissory note more negotiable than a bill of exchange.

THERE has since been no doubt, but that actions may be brought by bearers of such promissory notes against the drawers. In a late case, *Miller, v. Race*, [in C. IX. § vi.] a bank note, though stolen out of the mail, yet being negotiated and coming to the bearer *bona fide*, was held recoverable. In *Walmsley and Child*, [1 Vez. 341.] the defendant gave a shop note to A. or bearer. A. lost it, and demanded the money at Child's. They agreed to pay, if he would give them security, that the note should never be forth-coming to charge them. He refused, but offered a release; being advised, that no action

action could be brought by bearer, in case A. released. They still refused, and a bill was brought to compel the payment. Lord Hardwicke dismissed it, unless A. would give security.

It appeared, that in their books no credit was raised, but to bearer. Bearer debtor, and bearer creditor. No other name made use of, in entering this sort of note:

As this is my opinion in point of law, and as I unadvisedly left this point to the jury, there must be a new trial, upon the ground of my misdirection. And as both parties are innocent men, I think the law should decide between them, and not leave it to the partiality of the drawee, to pay which ever he likes best.

JUSTICE WILMOT: If both are equal in point of justice, *melior est conditio possidentis*, [the possessor's condition is better] I know not how any remedy can be had, unless the bearer can maintain this action. The word bearer is only a description of the person with whom you contract.—A name is only a like description. The contract is to pay the bill either to you, or to the person to whom you shall deliver it, or to whom he shall deliver it, *in infinitum*. It is clear, that if the drawee pays it, it is good payment; and the case in *Shower* is a clear authority, that a *bona fide* holder may recover. The subsequent cases are ill-founded, and strike at the root of credit; for if only the person named in the bill can bring the action, who would ever take it in payment? but had they been well founded, the statute of Queen Anne is decisive. Bills of exchange are only promissory notes, to pay such a sum in case the drawee does not.

JUSTICE YATES: I am clear that the jury did wrong. In an action for money had and received, the bearer who had paid the money, had a right to call upon the drawer himself who had received it. *Ward and Evans*, lord Raymond, 928.—The judges having delivered their opinions, the rule for a new trial was made absolute^a.

FROM what has here been related it is perceivable, that a bill or note made payable to bearer is transferrable by delivery without indorsement; and that the person who comes by it fairly and for a valuable consideration may recover thereon in an action against the drawer. Yet such bill may be indorsed and the holder may have his action against the indorser, as shown in C. III. § v.

§ VI. WITH respect to who may indorse. 1. The right to indorse bills and notes is in the payee, or, if the same are made

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^a 1 Black. Rep. 485.

made payable to more than one person the payees^a and he or they to whom the same have been indorsed; and that the payees, where a bill is made payable to two persons, ought to indorse the same unless they were partners, is shown hereafter in § VII. par. 1.—That the payee of a bill made payable to order must indorse the same, and his hand writing be proved in an action brought by an indorsee is demonstrated in C. IX § II. par. 1. Yet if a man has a bill of exchange he may authorize another to indorse his name upon it by *parole*; [words] and when that is done it is the same as if he had done it himself^b; but in case of an action such authority must be proved to have been given, in like manner as where a person draws or accepts for another, treated on in C. III. § 1. par. 1.

If the right to indorse be in a *feme sole*, [unmarried woman] and she afterwards marry, this right will be in her husband, by the general rule of law, as that a feme covert or married woman can have no property either real or personal. However in divers instances, whereof mention will hereafter be made, a wife may contract and be sued as a *feme sole*.

2. If the right to indorse be in a person who dies, the same will be in his personal representatives, whereof more particular mention will presently be made. If such right was in a person who becomes bankrupt, it will be in his assignees.^c

That the personal representatives may indorse, was held in *Rawlinson v. Stone*, King's Bench, Mich. 20 Geo. II. on a writ of Error from the Common Pleas. In this case, an inland bill of exchange was made payable to A. or order. A. died, and the administrator of A. assigned the note to the plaintiff in the Common Pleas; for whom the court gave judgment upon demurrer. The court upon argument of the writ of Error here, held, that the executor or administrator might assign it over: And they affirmed the judgment of the court of Common Pleas. The executor or administrator is only assignee in law; not in fact. Yet they held that he might assign it by the name of executor or administrator, and that it was the common method to do so. The indorsement virtually included it.—By justice Buller in delivering his opinion in the case of *King and others executors of Stevenson v. Thom*, Mich. 27 Geo. III. If executors indorse they are liable personally, and not as executors; for their indorsement would not give an action against the effects of the testator.—In this case it was held, that, where

^a 12 Mod. 564.

^c *Trader's and Conveyancer's Guide* 2d Guard, Chap. VIII.

where a payee of a bill of exchange indorses it to A. and B. as executors, they may declare as such in an action against the acceptor^d.

A NOTE payable to a *feme sole*, or order, who afterwards marries, can only be indorsed by the husband^e. And where an action was brought upon a promissory note made to a married woman, and indorsed by her to the plaintiff, judgment was given for the defendant; the right being in point of law vested in the husband, and the wife having no power to dispose of it^f; which she cannot have pursuant to the general rule of law, as before hinted; yet in cases where a wife may be supposed to have a separate existence she may contract and be sued as a *feme sole*; as by the custom of London a *feme covert* shall sue and be sued, if she is a sole merchant or trader, and where the husband does not intermeddle, and if the action is laid in the city the husband shall be named for conformity; but if judgment be given, execution shall be only against the wife. In the case of *Corbett v. Poelnitz and Ann his wife*, King's Bench, Mich. 26 Geo. III, it was held that a *feme covert*, living apart from her husband, and having a separate maintenance, may contract and be sued as a *feme sole*. That she continues liable notwithstanding she alienates the whole again; and that in such case the husband is not liable even for necessities. That where credit has been given to the wife of a man in exile, she alone is liable; so where the husband has abjured the realm, and where he is transported; and where a married woman has a separate estate and acts and receives credit as a *feme sole* she shall be liable as such^g. But a *feme covert*, living in adultery, and separate from her husband, cannot be sued as a *feme sole*, if she have no separate maintenance^h.

3. A BILL payable to one for the use of another may be indorsed over by him to whom made payable. If A. draw a bill of exchange payable to B. for the use of C. and B. for a valuable consideration indorses it over to D; D. may bring an action against A. the drawer; and he cannot plead that the money was extended in his hands at the suit of the king, for a debt due from C. for C. being only *cestui que trust*, had only an equitable interest, and no legal remedy for the money; and B. is only responsible in equity to C. for the breach of trust. Adjudged and affirmed in the Exchequer Chamber, it appearing that the bill was indorsed before any seizure or

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writ

^d 1 Durnf. and East, Rep. 487.

^e 3 New Abr. 610.

^f Str. 516.

^g Trader's and Conveyancer's

Guide and Guard, Chap. IV.

¹ Durnf. and East, Rep. 5.

^h *Gilchrist v. Brown*, Trin 32 Geo. III.

⁴ Durnf. and East, Rep. 766.

writ of extent issued out; and an indorsement on such a bill was good by the custom of Merchants¹.—This bill was drawn payable to Price or order for the use of Calvert, heretofore mentioned in C. IV. § XI. par. 2.

4. IF an infant draw a bill of exchange infancy is a good plea in bar to an action brought against him; as mentioned in C. II. § IV. par. 1. So if an infant indorse no recovery can be had on that indorsement against him. But if an infant draw a note, and it be indorsed by another, the indorsee has his remedy against the indorser; as shown in C. III. § IV.

§ VII. 1. WHERE a bill of exchange is drawn by two (not being in partnership) payable “to us or our order,” and subscribed by both, it should be indorsed by both; as in *Carvick v. Vickery*, Hil. 23 Geo. III. wherein the action was brought by the indorsee of a bill of exchange, which was in the following form: “Mr. *Abraham Vickery*,—Two “months after date, please to pay to us or our order” the sum “of, &c.—*John Maydwell*.—*John Maydwell*.”

The bill was indorsed thus;

“*Jn. Maydwell*.
Holloway.”

The Maydwells were father and son. The indorsement was by the son. They were admitted not to be partners. The bill, when due, was presented to the defendant, and accepted, and, at the time of the acceptance, he wrote upon it a direction to his banker to pay it. The cause was tried at the sittings after Mich. Term, 23 Geo. III. at Guildhall, before lord Mansfield, who non-suited the plaintiff, because there was not an indorsement by both the parties, to whose order the bill was made payable. In Hilary term next ensuing a rule being obtained to shew cause, why there should not be a new trial, this case was argued by counsel on each side, on the 1st of February.

IN support of the non-suit it was insisted that it was clear, when two or more persons are the payees of a bill of exchange, (which in this case the drawers were) and there is no partnership between them, the indorsement of one will not bind the rest, nor make the bill negotiable. The only reason for the names of both the father and the son appearing to this bill, must have been, to prevent its being paid without

¹ *Evans v. Cramlington*, Cunningham's Law of Bills, 65. cites Carth. 5. Skinner, 264. 1 Show. 5. S. C. 2 Ven. 309. S. C.

without the joint order of both. Even if the indorsement had been specially by the one, to pay for himself *and the other*, yet, without evidence of a partnership, the other could not have been bound. The first promise of the acceptor was to pay to the order of *two*, and a new promise to pay to the order of *one* could not be raised, without a consideration. It would be a *nudum pactum* [a naked agreement]. Indeed, where there is a partnership, the acceptance of one partner does not bind the others, unless the bill concerns the partnership trade. This was determined in the case of *Pinkney v. Hall*, [in C. IV. § XI. par. 1]. The same thing must hold as to indorsements. If there is no case exactly on the subject, it is because the matter has never been doubted. *Whitcomb v. Whiting* may be cited on the other side; but it is not *ad idem* [to the same point]. The statute relative to promissory notes [in C. II. § III. par. 1.] only enables *such servant or agent as is usually intrusted* by the principal, to bind him by his signature. A partner's signature binds the partnership upon that ground; for every partner may be considered as an agent for the rest of the partnership.

ON the other side, it was argued, that two persons, by joining in the same bill, hold themselves out to the world as partners, and therefore, for that purpose are to be treated and dealt with as such. It appears by the evidence, that the acceptance and order to the banker were after the indorsement; that order therefore, amounted to a recognition of the power of the one to bind the other. Besides the son had the custody of the bill, which implied an authority from the father to negotiate it. The before-mentioned case of *Whitcomb v. Whiting*, was cited.

LORD MANSFIELD, chief justice: I have looked into that case, and do not think it *ad idem*. The general question is of great importance, *viz.* Whether an undertaking by a bill of exchange to pay A. *and* B, is an undertaking to pay A. *or* B. We will therefore take some time to consider of it. And the court took time to deliberate from the 1st till the 4th of February, when lord Mansfield delivered their unanimous opinion, that the Maydwells, by making the bill payable "*to our order*," had made themselves partners as to this transaction, whereon the rule for a new trial was made absolute.

AND at the ensuing sittings at Guildhall, on 3d March, 1783, the new trial came on before lord Mansfield, and a special jury; when Wallace, counsel for the defendant, stated and offered to prove, that, by the universal usage and understanding of all the bankers and merchants in London, the indorsement was bad, because not signed by both the payees.

Howarth, counsel on the other side, objected to any evidence of that sort; insisting that the point was a question of law, and had been decided by the court. But lord Mansfield said, he did not think the question was so decided as to preclude the evidence offered; and therefore, over-ruled the objection.—Wallace then called Mr. Gosling, an eminent banker, to prove the usage; but the jury *una voce*, [with one voice] declared they knew it perfectly to be as he had stated it, and without hearing the witness found a verdict for the defendant.^a

2. In partnerships, the act of one partner will bind the rest. And all latent partners are liable for the acts of ostensible persons in the firm of any business in which such persons have any concern^b. In *Lyn and others v. King and Charlton*, at the sitting just now cited, an action was for recovery of 130l. the amount of a bill of exchange.—In evidence on the part of the plaintiffs it was proved that they had received a draft drawn in the name of King and Co, on one John Purclow, which not being accepted was returned to the defendants.—The defence set up was, that King and Charlton were not partners in the transaction to which this draft related; they were only engaged together in the pottery business.—Lord Kenyon, conceived that such defence was inadmissible; and that when any persons engage in partnership they make themselves liable for whatever debts are contracted, whether with or without the knowledge of each other, and this his lordship supported, by an opinion of Lord Mansfield, on a very celebrated case decided some years ago. — A country gentleman of great fortune, had lent a sum of money to a house, and was to receive interest in proportion to the profits of the house: the house failed, and it was Lord Mansfield's opinion that the country gentleman had made himself a partner, by which he was totally ruined. — Verdict was found for the plaintiffs, with the amount of the bill of exchange and interest for five years.

CONCERNING what will constitute a partner, and make a man liable as such, hath been much litigation, as appears by the different cases which we shall here attend to, and from whence may be perceived what will constitute a partner and make a man liable as such, and likewise how partners may be sued.

WHERE there was a partnership for seven years between *Brooke and Pell*; but at the end of one year agreed to be dissolved,

^a Doug. Rep. 653. 2 Edit.

^b Per Lord Kenyon, in *Hill v. Ogle*, Sittings after Trin. Term, 34 Geo. III.

dissolved, but no express dissolution was had. The agreement recited, that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed, that Brooke, should give Pell a bond for 2485l. which Pell had brought into the trade with interest at five *per cent.* which was accordingly done. And it was farther agreed, that Brooke should pay to Pell 200l. *per Annum* for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants, that Pell should have free liberty to inspect his books. Brooke became a bankrupt before any thing was paid to Pell. And an action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it shall not lie in the defendant Pell's mouth to say, it is usury, and not a partnership.

BUT where money was lent to a trader by a partner who retired from business, at legal interest, with an additional annuity for a certain term of years, it was held by the court of Common Pleas not to be a continuation of the partnership. Davey counsel for the plaintiff in arguing for a new trial, here insisted, that the agreement was either a secret continuance of the old partnership, or a secret commencement of a new one; being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade; and to receive for it twelve and an half *per cent.* profit, which could not be fairly done, unless it be understood to arise from the profits of the trade. And that defendant ought therefore to be considered as a secret partner. And he relied much on the case of *Bloxham v. Pell*, above cited.—For the defendant it was argued that the present case is very distinguishable from that of *Bloxham v. Pell*. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. This annuity was expressly given as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual; it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of the borrower. It is not a necessary dilemma, that it must be either usury or partnership. It may be, and probably was, a premium for the good will

* *Bloxham v. Pell*, Sittings in March, 1775. cited in 2 Black. Rep. 999.

will of the trade. And whether that is agreed to be paid at once, or by installments, it is the same thing.

JUSTICE BLACKSTONE. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite and depending on the accidents of trade. In the former case it is a loan (whether usurious or not, is not material to the present question) in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount^d.

As a man may be constituted a partner, and liable as such by lending money to a trader, for which he is to have more than legal interest; so he may be by joining in the purchase and sale of particular goods. But it is held that, to make a man liable as a partner, there must either be a contract between him and the ostensible person to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself^e. And that, if A. B. C. and D. enter into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase, but it does not appear that they are jointly to resell the goods. On failure of A. the ostensible buyer, B. C. and D. are not answerable to the seller as partners^f. By Lord Loughborough in delivering his opinion in *Coope v. Eyre*, the case just now cited. This is an action on a contract of sale, the vender can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has been justly observed, that a secret partnership can be no consideration to the vender; though for reasons of policy and general expedience the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of Europe, limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership a communion of profit and loss is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in

^a *Grace v. Smith*, Easter, 15 Geo.

III. 2 Black. Rep. 998

^f *Coope v. Eyre*, Trin. 28 Geo. III. 1 H. Black. Rep. 37.

^e *Hoar v. Dawes*, E. 20 Geo. III.

Doug. 371. 2 Edit.

in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners.

IN a very late case before the court of King's Bench, wherein is contained various learned disquisitions on what will make a man liable as a partner, was an action for goods sold and delivered, brought under orders of the Lord Chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendants; and here the Court held that, acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract. But if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterward become a partner (not even an acknowledgement that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange ^g.

WITH respect to suing partners, it is held that, *assumpsit* for partnership debts may be brought against one partner only; and unless he pleads in abatement, he shall be afterwards concluded ^h. So if an action is brought against one partner only, no advantage can be taken of the omission, but by plea in abatement ⁱ. For conformity sake partners must all be made parties, if the defendant insists on it, in the beginning of the suit, by a plea in abatement. If he does not plead in abatement, he waives the point, and shall not be allowed to set it up, when perhaps he has no defence, when the cause goes down to trial.—In general, it is conceived there is no reason, to make all the partners defendants in an action of *assumpsit*, though upon a known partnership debt ^k.

THE contract when made with partners, is originally a joint contract, but may be separate as to its effects. Though all are sued jointly, and a joint execution taken out, yet it may be executed against one only. Each is answerable for the whole, and not merely for his proportionable part. Equity must be called in to make the rest contribute. A creditor, being party to the contract, is bound both by law and conscience, to do all that is necessary to effectuate the contract. He may sue one of his debtors only; but if the defendant

^g *Saville v. Robertson*, Trin. 32 Geo. III. 4 Durnf. & East, Rep. 720.

^h *Rice v. Shute*, E. 10 Geo. III.

ⁱ Black, Rep. 695.

^j *Abbot v. Smith*, E. 14 Geo. III. *Ibid.* 947.

^k 2 Black, Rep. 697.

defendant calls on him to make all the rest defendants, he shall be obliged to do it. It is just that it should be so. 1. That all may assist in defence. 2. That all may enter into a ratable contribution to pay what shall be recovered. 3. To take away all colour and pretence of collusion'.

3. POWER given to one partner on dissolution of partnership to receive and pay debts, does not authorize him to indorse a bill in the name of the partnership, though drawn by him in the name, and accepted by a debtor of the partnership after the dissolution; as in *Hilgour v. Finlyson, Galbreath and Harper*, Common Pleas. Hil. 29 Geo. III. it was held that on the dissolution of a partnership between A. B. and C. a power given to A. to receive all debts owing to, and pay those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in the name, and accepted by a debtor of the partnership after the dissolution; and that the indorsee cannot maintain an action on the bill against A. B. and C. as partners; and that neither can such indorsee maintain an action against them for the money paid to the use of the partnership, though in point of fact the money raised by discounting a note which he had given (in discounting the bill,) be applied by A. to the payment of a debt due from the partnership.

THE circumstances of this case were as follow—The plaintiff was a warehouseman and factor, the defendants were also warehousemen and factors in partnership from Midsummer 1785 to the 28th of July 1787, when the partnership was dissolved and notice of the dissolution given in the Gazette as under.

“ Notice is hereby given, that the copartnership between
 “ Thomas Finlyson, Thomas Galbreath, and Henry William
 “ Harper, of Bow church-yard, Warehousemen, under the
 “ firm of Finlyson, Galbreath and Harper, and also at
 “ Glasgow under the firm of Henry William Harper and
 “ company, was by mutual consent dissolved this day; all
 “ demands upon the above firm will be paid by Thomas
 “ Finlyson of Bow church-yard, who is empowered to re-
 “ ceive and discharge all debts due to the said copartnership.”
 “ Witness our hands, this 28th day of July 1787.—Thomas
 “ Finlyson — Thomas Galbreath.—Henry William Harper.

AT the time of the above dissolution, one Scott was indebted to the partnership in 758l. and the partnership indebted to Sterling Douglas, and Co. in 890l. On the 21st. of September 1787, Finlyson drew the bill in question in the name of the late partnership on Scott, payable on the 23d. of
 November

November following for 304l. 2s. which Scott accepted. On the 9th. of October Finlyson indorsed it, in the name of the partnership, to the plaintiff, who discounted it, by giving his own promissory note, for 304l. 3s. 6d. payable on the 25th of November, (the difference of 1s. 6d. being on account of the note being due two days later than the bill). This note of the plaintiff's was indorsed by Finlyson to Sterling Douglas, and Co. who discounted it, and received the money they had advanced by so discounting the note, back again from Finlyson, in part of payment of the debt owing to them from the partnership. When the note became due, the plaintiff paid it to Sterling Douglas and Co. two days before Scott's bill become due, Finlyson took it up, and gave in lieu of it another bill to the plaintiff, accepted by Lee, Strachan and Co. but did not take back Scott's bill. Afterwards Lee, Strachan and Co's. bill not being paid, and Finlyson having become a bankrupt, the plaintiff brought this action against all the partners, on Scott's bill which remained in his hands, and obtained a verdict.—A rule was granted to shew cause why this verdict should not be set aside, and a new trial granted.

LORD LOUGHBOROUGH. I was of opinion at the trial, that there was an equity in favour of the plaintiff, the money arising from his note being *de facto* applied for the benefit of the partnership, and the authority from the other partners giving him power to discharge their debts. But I am now convinced that I was mistaken. Consider the nature of this transaction; Finlyson applies to Kilgour to discount the bill accepted by Scott, and in part of the discount takes a promissory note from him; Kilgour, before Scott's bill became due, changes it with Finlyson for another, accepted by Lee, Strachan and Co. returns that, and takes Scott's bill back again. Now all this was carried on, without any idea of the former partners being bound by it. On the 10th of October, long before the plaintiff's note was due, the defendant applied to Sterling Douglas and Co. to discount it, who accordingly did discount it, but received the money back again in part of payment of their debt owing from the partnership. When this note became due the plaintiff paid it to Sterling Douglas and Co. but at that time no debt was owing to them from the partnership, the payment therefore of the plaintiff, was not a payment to the use of the partnership, though the money raised by discounting his note before it was due, was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by Finlyson.—

son.—Heath and Wilson, Justices of the same opinion. Justice Gould absent.—Rule absolute for a new trial^a.

4. WHERE a man is a special agent under a limited authority, it is held that he cannot bind his principal by any act beyond the scope of such limited authority. But if an agent employed by the indorsees of a bill to get it discounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund if the bill be afterwards dishonoured by the acceptor; as in *Fen v. Harrison*, Trin. 30 Geo. III. On a motion for a new trial, the facts appeared to be these; this was an action for money lent, money paid by the plaintiffs to the use of the defendants, and money had and received by the defendants to the use of the plaintiffs. A bill of exchange was drawn by Livesey and Co. on Gibson and Johnson in favour of one Norman, which came by indorsement to the defendants; who, being desirous of getting it discounted, employed Francis Huet for that purpose, telling him to carry it to market and get cash for it, but that they would not indorse it. F. Huet applied to his brother James Huet to get the bill discounted, informing him that it was the defendants' bill, and that though they did not choose to indorse it, yet he added (as a reason of his own) that, as their number was on the bill, it was equivalent to an indorsement; and he (F. Huet) would indemnify him if he indorsed the bill. On an application by James Huet to the plaintiffs, and on his indorsing the bill, without which indorsement he could not have got the bill discounted, the plaintiffs discounted it; chiefly relying on the credit of Gibson and Johnson, for at that time they did not know that the defendants had any concern with the bill. Afterwards however, on the failure of Gibson and Johnson, the plaintiffs, having heard that the bill had passed through the defendants' hands, applied to them for payment, who at first refused, but afterwards promised to take it up; and, on their not doing so, this action was brought to recover the amount of it. Lord Kenyon, before whom the cause was tried, after reporting the above facts, said that he had told the jury that, if they were of opinion that James Huet had made himself answerable to the plaintiffs, as agent for the defendants, that that was a sufficient consideration for the defendants' promise; and that they were of that opinion and found a verdict for the plaintiffs. [This was a second verdict: The plaintiffs had obtained a former verdict; but the court granted a new trial (without much discussion) for the purpose of having the subject better considered].

A rule

^a 1 H. Black. Rep. 155.

A rule having been obtained to shew cause why this verdict should not be set aside, and another trial granted, on the ground that this was a *nudum pactum* [a naked agreement].—The counsel for the plaintiffs contended, that the promise made by the defendants was binding on them, whether considered as given by them when under a *moral* obligation to pay, or as having received a *legal and valuable* consideration for it. —For the defendants, it was insisted that they were under no moral or legal obligation when they made the promise in question, and consequently it was not binding. The substance of the authority given by the defendants to F. Huet was that he should *sell* the bill; for that they would not make themselves liable either on the bill by their indorsements or by any other circuitous mode.

LORD KENYON, chief justice, said, it is extremely clear that, if the holder of a bill of exchange send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money, for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin. In this case therefore if the defendants had known the bill to be bad, there is no doubt but that they would have been obliged to refund the money. I agree with the defendants' counsel that Francis Huet was circumscribed in his authority; and if that circumstance would protect the defendants, they would not be answerable in this action. But I am of opinion that that circumstance is not a decisive answer to this action. When James Huet received this bill, he was informed that it came from the defendants; and on his asking why they had not indorsed it, he was told by Francis Huet that they had done that which was equivalent to it, for that their number was on it; in this indeed he was mistaken. However he told James Huet that he should be safe, and that he would guarantee him, on which the latter indorsed his name on the bill, and thus indorsed, it got into the hands of the plaintiffs. Then it is clear that the plaintiffs might resort to James Huet for payment: and that brings it to this question, whether James Huet, who took the bill from Francis Huet knowing him to be the agent of the defendants, has not a right to call on the defendants, who constituted Francis Huet their agent, although that agent exceeded his authority; I think that he has. And if so, that is a good consideration for the promise made by the defendants.

JUSTICE

JUSTICE ASHHURST. If Francis Huet had been the *general* agent of the defendants, I admit that they would be chargeable with his acts: but it appears from the evidence that he was constituted their *particular* agent with a circumscribed authority. Francis Huet who was employed by the defendants to get the bill discounted, was expressly directed by them not to indorse it, which was equivalent to saying that they would not pay it. I agree that F. Huet would be liable to James Huet, either as for money paid to his use, or on the express promise to guarantee: but there it stops; for, as to the defendants, he paid the money in his own wrong, because the authority which they gave was exceeded. Therefore, on the whole, I think that the defendants are neither liable on account of the indorsement made by James Huet, nor on their subsequent promise to pay, because not being under any obligation it was *nudum pactum*.

JUSTICE BULLER. In this case the defendants said in the most express terms that they would not make themselves liable on the bill; for when they told F. Huet that they would not indorse it, it was the same as if they had told him in terms *to sell it*. When a person refuses to indorse a bill, it cannot be implied that he means to make himself liable on the bill, much less in a more extensive way than if he had indorsed it. The authority of F. Huet was circumscribed; he was mistaken in what he said to J. Huet; he did not even desire J. Huet to act on the authority of the defendants; he *thought* that the defendants would be liable; but that was merely his opinion. F. Huet therefore did not merely pledge the names of the defendants in any way whatever: Consequently they were under no obligation whatever to promise, and it is *nudum pactum*. I agree with my brother Ashhurst, that there is a wide distinction between *general* and *particular* agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeded his authority; for that would be to say that one man may bind another against his consent.

JUSTICE GROSE. The question is, whether at the time when the defendants made this promise it was *nudum pactum*, or whether there were any legal consideration for it. In the first place, this is a new attempt to make the defendants liable as if they had indorsed the bill, when in fact they refused to indorse it. The substance of the conversation between the

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defendants and F. Huet was this; they said "take the bill, get it discounted, and sell it, but we will not be answerable to the holder of the bill in any way whatever." If that be so, undoubtedly they were not liable to the holder; and then the subsequent promise is without consideration, unless something passed at the time when it was made to raise a consideration. But nothing is stated to shew that the defendants received any benefit, or that the plaintiffs renounced any advantage. A strong circumstance in this case is that at the time of the original transaction the credit of *Gibson* and *Johnson* was much relied on. Then there is no pretence to impute fraud to any of the parties; and, if not, the morality follows the law. I consider this as a new and dangerous attempt to make the defendants liable, and that even beyond the extent to which indorsers are; and if we were to make them liable, it would be difficult to say what law attaches on them. As to the distinction between a *general* and *particular* agency; I think it was pointedly put by my brother Ashhurst, with whom I intirely agree.

THREE Judges differing in opinion from lord Kenyon the rule for a new trial was made absolute ^b.

ON the third trial of this cause the same evidence was given as on the second trial, with this difference, that when the defendants desired F. Huet to get the bill discounted, *they did not say they would not indorse it*. The jury found a verdict for the plaintiffs, which the defendants' counsel moved in Hil. Term 31 Geo. III. to set aside; but the court were unanimously of opinion that the rule for setting aside the verdict, and granting a new trial, should be discharged; on the ground that as the defendants had authorized F. Huet to get the bill discounted without restraining his authority as to the mode of doing it, they were bound by his acts; and that, if it were doubtful, from the conversation which passed between the defendants and F. Huet at the time when they applied to him to get the bill discounted, what authority the defendants intended to confer on F. Huet in this transaction, their subsequent conduct, in promising to pay the bill was decisive.—But the three judges, Ashhurst, Buller, and Grose, said, that, had not the evidence on this trial varied from that given before, they should have continued to entertain the same opinion which they delivered on the former occasion ^c.

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CHAPTER

^b 3 Durnf. & East, Rep. 757.

^c 4 Durnf. and East, Rep. 177.

CHAPTER VII.

Of the Consideration on which Bills and Notes may have been obtained. Of their being lost, stolen, forged, uttered under false Representations. Negotiating, discounting them.

AS in C. III. § iv. alluding to this chapter, we briefly mentioned the cases in which a bill or note would be void in the hands of an innocent indorsee; and that in other cases which are purposed to be here treated on, although a bill or note may be avoided if obtained on a bad or illegal consideration, yet the consideration cannot be taken advantage of, but in an action between the original parties; and that when a bill or note is transferred and passes into the hands of third persons, who gave a valuable consideration, the transaction between the original parties cannot in an action be enquired into, unless in the cases there mentioned. Here we shall in our first section treat on the consideration that may be enquired into, in an action between the original parties themselves. In § II. on the consideration by which a bill or note will be void in the hands of an indorsee. On the alteration of the date of a bill of exchange after acceptance; and on a promissory note being indorsed after it become due. In § III. on bills and notes being stolen or lost; and how the loser should act for recovering his misfortune. In § IV. on stealing bills and notes, and its being felony. Obtaining them with design to defraud. Negotiating them by an innocent person after being stolen. In § V. on forging bills and notes; uttering same under false representations. And in § VI. on that an innocent holder of a forged bill may recover against the acceptor. On discounting bills and notes; and lay down the tables for calculating the interest.

§ I. AS to the consideration that may be enquired into, in an action between the original parties themselves; this may be in various instances, as will be seen in the following paragraphs.

1. As where the consideration is for the performance of any thing illegal; as in an action on a note of hand, on the trial the defendant gave in evidence, that the note was obtained upon a smuggling consideration; on which the jury found a verdict for him. On a motion for a new trial, lord Mansfield was strongly of opinion, that such evidence should not have been admitted; and took a difference, where the plaintiff

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plaintiff alleges the *turpis causa* [the foul cause], as the cause of his action; and where the defendant sets it up as the ground of his defence; in both which cases he denied that either party should avail himself of his own wrong, and granted a rule to shew cause. But afterwards in the close of the term, the cause being compromised, lord Mansfield took it up again *mero motu*, and declared that it was now the clear opinion of the whole court, that on this action an illegal consideration might clearly be set up as a defence; and they did not see why it might not be done on an action of debt on bond; for every creditor ought in justice to prove the consideration on which his contract is founded, and though the law allows bonds and notes, to be *primâ facie* evidence of a good consideration, without proving it on the part of the plaintiff, yet it ought not to preclude the defendant from shewing, that the consideration in fact is a bad one^a.

If the consideration is illegal it will be sufficient to preclude the plaintiff from recovering in his action. But if the original transaction is not morally bad, its illegality arising only from its being prohibited by statute, every thing done in consequence of the statute will not be deemed void; as where money was borrowed to pay a stock-jobbing contract, though of a partner in the transaction, it was held not to be within the statute of 7 Geo. II. but recoverable; as in *Faikney v. Reynous* and *Richardson* E. 7 Geo. III. Debt on bond 23d Feb. 1765, for 3000l. Defendants pleaded that since the statute 7 Geo. II. the plaintiff corruptly entered into several agreements for transferring sundry parcels of stock, on the joint account of himself and defendant *Richardson*, to be delivered at a certain time, called the rescouter day in February following; and in performance thereof, corruptly and contrary to the form of the statute paid 3000l. to divers persons, for making up the differences in price, for not performing said contracts; and that the bond was made for securing to the plaintiff 1500l. being *Richardson's* moiety of the said differences; and for no other consideration, and therefore void in law. The plaintiff demurs and defendant joins in demurrer.

LORD MANSFIELD, chief justice: I am clear that this is no defence, even allowing it to be well pleaded. Compounding differences for stock sold is not *malum in se*, but merely *prohibitum*. Where a thing is prohibited by act of parliament, it is void as between the parties; and no court of justice will

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allow

^a *Guichard v. Roberts*, Mich. 4 Geo. III. 1 Black. Rep. 445.

allow a man to recover for what is made unlawful to be done. But this case is not within the act of parliament.—The bond is for money lent to another to fulfil a prohibited contract. If a man lends money to be lent upon usury or to pay a gaming debt, can it not be recovered? There is no difference whether borrowed of Faickney or of any other person.—Judgment for the plaintiff^b.

So in a later case wherein the doctrine of the abovementioned is recognized, it was held that if two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker with the privity and consent of the other the whole sum, he may recover a moiety from that other in an action for money paid to his use, notwithstanding the statute 7 Geo. II. c. 8. As in *Petrie v. Hannay*, Mich. 30 Geo. III. In the year 1773, Sadlier, Petrie, and the defendant, were engaged together in stock speculations on their joint account to a considerable amount, the whole of which were illegal, except a transfer of a sum of 10,000l. Having incurred several losses, on the 8th January 1774 they came to a settlement with Portis their broker, who had paid all the differences. And on that occasion Keeble repaid to Portis the whole sum which had been so advanced by him, except 811l. which was part of the defendant's share of the losses, and for which Keeble drew a bill on him in favour of Portis, which the defendant accepted. This bill not being paid by the defendant when it became due, Portis brought an action thereon, after Keeble's death, against the present plaintiffs his executors, and recovered the amount, no defence being set up on account of the illegality of the transaction: 264l. part of the sum for which the defendant had given his acceptance, was his share of the loss arising from the real transfer of the 10,000l. The present action was brought to reimburse the plaintiffs the sum recovered against them by Portis, and the declaration was for money paid by the plaintiffs to the defendants' use, upon which they obtained a verdict for the whole demand, at the sittings after last Easter term at Guildhall before lord Kenyon.

A RULE was obtained last term to shew cause why the verdict should not be set aside in whole, or at least be reduced to the sum of 264l. And after arguments by counsel hereon, lord Kenyon: chief justice, in delivering his opinion says, "The first action, which was brought against these plain-

"tiffs,

^b *Faickney v. Reynolds*, Mich. 7 Geo. III. 1 Black. Rep. 630.

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"tiffs, was on a bill of exchange, which had been accepted
 "by the defendant on account of the losses: Now it is clear
 "that that action did not merge the original demand, and
 "the whole transaction may still be brought before the court.
 "And if it appear to the court that a bill of exchange is
 "given without any consideration, it is *nudum pactum ex quo*
 "*non oritur actio*, i. e. a naked agreement, from which arises
 "no action; or if it be for an illegal consideration, the whole
 "matter may be examined."—Here the whole transaction
 may be enquired into, which, on examination, is, I think,
 prohibited by statute 7 Geo. II. c. 8.

BUT the three other judges differing in opinion from the
 chief justice, held that this case was governed by that of
Faikney v. Reynous, and by Mr. Justice Ashhurst in deliver-
 ing his opinion: I think that this case must be governed by
 that of *Faikney v. Reynous*. And if we were to determine
 that the plaintiffs are not entitled to recover in this action, we
 must overturn the authority of that case. The court did not
 proceed in that case on the ground that it was an action on
 the bond, and that the defendants were not at liberty to go
 into the consideration of it; for they permitted a discussion
 of the facts stated in the plea, and they argued from them:
 but they said, that even admitting them to be true, still it
 was no defence to the action; and lord Mansfield and the
 whole court proceeded on the ground that it was not *malum*
in se, but only *malum prohibitum*; and as the plaintiff was
 not concerned in the use which the other made of the mo-
 ney, it was a fair and honest transaction between those par-
 ties.—The rule was discharged^c.

WHERE a transaction is impeached on account of its ille-
 gality, as being opposed to the law of this country, there is a
 distinction between the case, where both plaintiff and defend-
 ant reside here, and where the plaintiff resides abroad and is
 a foreigner and bound by no allegiance to this country; as
 that the subjects of one country residing there are not bound
 to take notice of the revenue laws of any other. In the
 latter case if the plaintiff know that the defendant intends to
 transgress the laws of this country, and he has contracted
 with him for goods, which contract is complete, before these
 laws can attach, he may recover on the contract^d. But it is
 otherwise when the plaintiffs or some of them reside in a
 place subject to the crown of Great Britain. An action
 cannot be maintained by several partners for goods sold by

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^c 3 Durnf. & East, Rep. 418.

^d Cowp. 341.

one of them living in Guernsey, and packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in England, knew nothing of the sale; for it is a contract by subjects of this country, made in contravention of the laws: and this case must be considered in the same light as if all the partners lived in England^e.

2. PAST seduction has been held a good consideration^f; but future prostitution an illegal one; and where a bond was given for cohabitation with a woman seduced by the obligor, and for maintenance after death; the bond was held void in law, being calculated for the purposes of prostitution; as in the case of *Walker v. Perkins administrator*, King's Bench, Mich. 5 Geo. III. In this case an action of debt was brought on bond for 600l. Defendant prays *oyer* of the condition; which recited, that the intestate William Perkins and Mary Walker the plaintiff, having contracted a love and value for each other, had agreed to live together, on the following terms, that he should find her with board, lodging, cloaths, and a servant to attend her; and, if he happened to die in her lifetime, or should refuse to live with her, he should pay her an annuity of 60l. *per annum*: and that if she left him, or kept company with any other man, he should not be obliged to pay her the annuity, or to find her in board, &c. The condition of the bond was therefore for the performance of this agreement. Whereupon the defendant pleaded, that this bond was given for an unlawful consideration, that of living together in a state of fornication; and was therefore void in law. Plaintiff replied, that she being a virgin, was seduced by the said Perkins; and that for making a provision for her, and as a compensation for her chastity, he gave her the said bond. To which the defendant demurred in law; and assigned several objections in point of pleading, which were waved on the argument, by Wedderburn defendants counsel, who insisted that, on the face of the bond, it appeared to be an illegal consideration, and therefore the bond was void.

BLACKSTONE, plaintiff's counsel argued, That the consideration in the bond was twofold; 1st. To engage plaintiff to live on with Perkins in a state of debauchery, which is immoral; and therefore contrary to law. 2d. To make a provision for her, in case of his death; which, as she was debauched by him, is clearly a good consideration, within the cases of lady

Annaldale,

^e *Biggs v. Lawrence*, Mich. 30 Geo. III.
² Durnf. & East, Rep. 454.

^f *Annaldale v. Harris*, 2 P. Will.
432.

Annaldale, 2 P Will. 432. *Cray and Rooke*, Ca. temp. Talbot, 153. That if a bond be conditioned to perform two things, one contrary to law, and the other consistent with law; the bond shall be good as to the latter, and only void as to the former.—That if the bond had been put in suit for not continuing to live together, the plaintiff could not have recovered; but being now sued on the virtuous part of the contract, to recover a maintenance after the obligor's death it was legal. And in support of this doctrine, he cited *Chefman and Nainby* Ld. Raym. 1456. Stra. 739, as full in point.

BUT by the court: The consequences drawn would be just, did not the foundation fail in point of fact. Here is no virtuous part in the contract. All is calculated for the purposes of prostitution: And by justice Wilmot. Instead of *premium pudicitiae* [a reward of chastity], this is *premium impudicitiae* [a reward of unchastity]. Therefore by the whole court: (except justice Denison who was absent during the term) judgment was for the defendant^s.

3. IN the case of prosecution for felony, an agreement to stifle such a prosecution is unlawful^b; as where the action was on a bond conditioned for the payment of a sum of money. The defendant pleaded after setting forth the condition, that it was entered into as an indemnification to the plaintiff for a note which he had given to a person, to bribe him not to appear as a witness on an indictment. And the court held that the deed was void *ab initio*ⁱ [from the beginning].

4. A RECOMMENDATION to an office in the King's household though of a private nature, and not within the statute of the 5th & 6th Ed. VI. is held to be an illegal consideration; as in the case of *Harrington executor v. Du Chatel executor*, in Chancery, 1781. The late lord Rochford being groom of the stole to his Majesty, and in consequence of that office recommending pages of the presence, &c. treated with the plaintiff's executor to recommend him upon a vacancy, on condition that he should grant two annuities, one of 100l. to St. Ferrol the defendant's testator, who had been lord Rochford's travelling tutor, and was then a bond creditor of his lordship for 600l. and the other of 40l. to another person. An action being brought upon the annuity bond, by defendant's testator, for the arrears of the annuity of 100l. the plaintiffs filed their bill for an injunction. The defendants had demurred and the demurrer had been over ruled, and

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upon

^s 1 Black. Rep. 517.

^b 2 P. Will. 279.

ⁱ *Collins v. Blantern*, Common Pleas,
7 Geo. III. 3 Will. Rep. 349.

upon the motion to continue the injunction upon the merits, the answer being put in; it was argued on the part of the plaintiffs, that this bond was *pro turpi causa* [for a foul cause], that lord Rochford having a confidence placed in him by the king, had abused that confidence, by selling his recommendation; and, upon the public policy of the law, such an agreement ought not to stand. On the other hand it was argued that it was allowed this was not an office within the statute of 5 & 6 Edw. VI. that it was merely an office respecting the king's private, not his public character; and that it was *turpis contractus* [a foul contract] that might have been pleaded at law.

LORD CHANCELLOR expressed his doubts, whether it might not have been brought upon the record at law, by a plea, and made a defence there to the action, but thought that not a sufficient reason to prevent his interposition, the court of law never having determined that it could be so brought there as a defence. He then admitting that it was not within the statute of Edw. VI.^k but treating it as a matter of public policy of the law, and familiar to *marriage brokerage bonds* where, though the parties are private persons, the practice is publicly detrimental, ordered the injunction to be continued till the hearing.—Upon the hearing Feb. 5, 1783, the injunction was ordered to be perpetual^l.

As to marriage brokerage. Contracts and bonds for money to procure marriage between others have been held void in equity; and wherever a parent or guardian insist upon private gain, on the marriage of children; covenant or obligation for it shall be set aside in chancery, as extorted from the husband^m. Such bonds although good at law, are justly condemned in equity, as introductive of infinite mischiefⁿ.

5. IT is an illegal consideration, where all the creditors of an insolvent, consent to accept a composition for their respective demands, upon an assignment of his effects by a deed of trust, to which they are all parties; and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made; the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action^o.

6. THUS having proceeded with the consideration that may be

^k Described hereafter in § 11. par. 7.

^l 1 Bro. Cha. Rep. 124.

^m 3 Lev. 41. 1 Salk. 156.

ⁿ 3 P. Will. 394.

^o *Cockshott v. Bennett*, Mich. 29 Geo. III. 2 Durnf. & East, Rep. 76.

be enquired into in an action between the original parties, we shall conclude this section with relating a case, wherein it was held that defendant might bring evidence that a bill of exchange was paid, although he had promised to pay it, and so avoid the promise by shewing no consideration for the bill. In Mich Term, 28 Geo. III. a rule was obtained to shew cause why there should not be a new trial, the cause having been tried before Mr. justice Gould at Hertford summer assizes 1787. And it appeared in evidence that the plaintiff and defendant had mutual dealings together, and had applied to one Rawnsley to settle their accounts, who had accordingly adjusted all matters in dispute, except the bill on which the action was brought. This the defendant said he could prove he had paid. Upon which, it was agreed that the bill should be deposited in the hands of Rawnsley, and if the defendant brought proof of the payment within a month, the bill should be delivered up to him, if not he promised to pay it to the plaintiff. No proof being brought by the defendant within the month, the bill was delivered to the plaintiff, who brought his action upon it.

THE counsel for the defendant offered to give in evidence, that the original debt was paid for which the bill was given, and that the defendant could not within the month find the witness by whom it might have been proved according to the agreement, he having absconded to avoid an arrest. This evidence the judge refused to admit, holding that the defendant was bound by his agreement to pay the bill if he did not bring the necessary proof within the month.

THE abovementioned rule being obtained to shew cause why a new trial should not be granted, on the ground that this evidence ought to have been admitted. — Lawrence, serjeant, having shewed cause against the rule, and Rooke, serjeant, argued in favour of it.

JUSTICE Gould, after stating the facts, said, that he was of opinion at the trial, that the plaintiff had a right to prove the special promise of the defendant, under the general count of *in simul computassent* laid in the declaration, on the authority of Buller's Nisi Prius, p. 139, and that the promise not being performed, was intitled to recover, the defendant not being at liberty to bring evidence in excuse for his non-performance, where the undertaking was peremptory. That such an undertaking was upon sufficient consideration, he cited the case of *Amie v. Andrews*, 1 Mod. 166. and *Knight v. Rushworth*, Cro. Eliz. 469. — The rest of the court were of opinion, that though this was a new promise on a special agreement, and though under a general count of *in simul computassent*, such a promise

promise might be given in evidence, yet as in the present instance, it was to pay an old debt, the condition not being performed, it was to be considered only as evidence of the debt, and the effect of it was to shew, that the plaintiff had *prima facie*, only a right to recover. The defendant therefore ought to have been admitted to prove that the debt was discharged, because by so doing, he would avoid the promise by shewing there was no consideration for it.—Rule made absolute ^p.

§ II. HAVING in our preceding section attended to different cases, wherein the consideration may be enquired into in an action between the original parties; we shall here proceed with the consideration by which a bill or note will be void in the hands of an indorsee, who has his remedy only against the indorser. And as this has been determined in different cases on the construction of certain statutes, we shall describe the cases, and afterwards attend to the statutes relied on in determining them, with some other statutes pertaining to this point. Then relate the case wherein it has been determined that an action cannot be maintained against the drawer or acceptor of a bill, which has been altered after acceptance; and conclude the section with the case of a bill or note negotiated after become due, in which the consideration may be enquired into in an action by an indorsee against the maker of a note.

I. IN the case *Hussey v. Jacob*, Mich. 8 W. III. Where lord Chandos lost money at play to Hussey, and gave him a bill of exchange for it on Jacob who accepted it and afterwards refused to pay; and Hussey brought *assumpsit* against Jacob upon his acceptance. The defendant pleaded that the lord Chandos played at hazard with the plaintiff Hussey, and lost to him at one and the same time 150*l*. and, that for payment and security thereof, he drew this bill of exchange upon the defendant payable to the plaintiff, which the defendant accepted; and then he pleads the statute of gaining of 16 Car. 2. c. 7. by which this bill of exchange being given for the security of the said sum gained at play became void. To which the plaintiff demurs, and after many arguments hereon the court gave judgment for the defendant. But held that if the plaintiff had indorsed the bill over to a stranger *bona fide* upon good consideration, and the stranger being ignorant of the wrong, the statute could not have been pleaded against such an indorsee, but it could against him who was party to the wrong ^a.

BUT

^p *Elmes v. Willis*, Common Pleas, Trin. 28
Geo. III. 1 H. Black. Rep. 64.

^a 1 Salk. 341.

BUT now it is held otherwise, as in *Bowyer v. Bampton*; Trin. 14 Geo. II. where the defendant borrowed money of J. S. who lent it knowingly to game with, and assigned the note for a valuable consideration to the plaintiff, who had no notice; yet it was holden void by 9 Ann. c. 14^b.

2. IN *Robinson and Bland*. Trin. 34 Geo. II. Sir John Bland gave a bill of exchange to Robinson, for 672l. viz. 300l. lent at the time and place of play, and 372l. lost. The play was very fair, and there was not any imputation on Robinson's behaviour. He brought an action of *assumpsit* against Sir John's representative on the bill of exchange, and also for money lent. Upon a case reserved, the court held that he should not recover on the first count, the bill of exchange being void by 9 Ann. But they held as to the second count, though no action could be maintained for money won at gaming, the statute prohibiting any recovery upon a gaming consideration, yet as to the money lent, the statute only avoids the security, and not the contract, which when fair is good, and therefore gave judgment for the plaintiff for 300l.—In the same case it was made a question, whether the plaintiff should recover any, and what interest. As to the first, the court said, that though the security were void, yet he had agreed to pay interest. As to the second, though the practice had been to stop interest at the bringing of the action, yet they held the plaintiff intitled to interest to the time of the judgment, and said, the court ought always to give interest to the verdict at least^c.

3. A BILL of exchange given upon an usurious consideration is void, even in the hands of an indorsee for valuable consideration without notice of the usury; as in *Lowe and others v. Waller*. This was an action directed by an order of the court of Chancery, dated 18th of December, 1780, and tried before lord Mansfield at Guildhall, at the sitting after Hilary Term 21 Geo. III. Whereupon a case was made for the opinion of the court, and after arguments thereon the court delivered their opinion with great deliberation.

IN the action the plaintiffs declared as indorsees of Harris and Stratton, to whom the bill was stated to have been indorsed by Lawton the drawer and payee. The defendant was the acceptor. The defence was, that the bill was given upon an usurious contract between Harris and Stratton, and the defendant. This was controverted by the plaintiffs; but they also insisted, that the bill was indorsed to them for a valuable consideration, and without notice of the supposed usury, and it was argued, that

^b Stat. 1156.

^c Law of Nisi Prius, 271. Edit. 1785.

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^b Stat. 1155.

^c Law of Nisi Prius, 271. Edit. 1785.

that although it should appear that the original transaction was usurious, still the defendant was answerable to them.

UPON the evidence it appeared, that, Waller, a commissioner of the stamp duties, had employed one Lemon, a money-broker, to raise the sum of 200*l.* upon the bill in question. Harris and Stratton, hearing of this, sent their broker to Lemon, to enquire whether Waller wanted money, and he told the broker he believed he did, for, to his knowledge he had a bill to pay in a few days. The broker said his principal would advance 100*l.* in money, and 100*l.* in goods, but that the goods should be choice sorts, and he should not lose by them; that he should have them at the warehouse price. Lemon upon this, went and informed Waller, that Harris and Stratton's broker had been with him; and Waller asking him how they would deal, he told him what had passed, and that the broker had appointed him to go with Waller, to Harris and Stratton's warehouse, the next day. Waller, agreeable to this appointment, went, along with Lemon, the next day, and found Harris and Stratton at their warehouse; who made an apology to Waller for not having any money at the time, but only goods; and desired the business might be let alone for a few days. Lemon called several times after this, to get a day fixed, and told them, as he had mentioned before to their broker, that Waller wanted money, in order to pay several demands. In the course of about three weeks, Harris and Stratton said to him, that, if Waller would come the next day, they would give him 50*l.* and he and Waller accordingly went the next day. When they came, one of the partners went out, and returned in a little time, saying he could not get any money. but if Waller would take the whole in goods, he should have them directly. Waller agreed; and the goods, (hosiery ware) were sorted out by one Strutt, a broker who was present, and delivered to Waller, and at the same time, Waller delivered to Harris and Stratton the bill of exchange, and also an assignment of his salary, as a collateral security in case the bill should not be paid when it should become due. Strutt and Lemon carried the goods to the shop of Elderton, an auctioneer, who was a stranger to Waller, and who was to sell them, or advance the value. He desired two hours to make his calculation, and, at the end of that time, Lemon and Waller came to him, and he offered 120*l.* for the goods, saying, it was the utmost they were worth. Waller took the 120*l.* it being agreed, that, if they should sell for more, the ballance should be accounted for by Elderton, and, if for less, that Waller should be answerable to him for the difference. Afterwards,

Elderton

Elderton delivered an account to Waller of the sale of the goods at 117l 2s. 2d. There was no evidence that the plaintiffs knew of the above transaction, or the circumstances under which the bill had been given.

THE question whether the transaction was a loan of money for more than 5 *per cent.* under colour of a sale of goods, was left to the jury. If they should be of opinion, that it was, it was agreed that a case should be reserved on the other point, being a mere matter of law.

In summing up the jury, Lord Mansfield told them, that the statute of usury [12 Ann. st. 2. c. 16.] was made to protect men who act with their eyes open; to protect them against themselves. Upon this principle, it makes it penal for a man to take more than the fixed rate of interest, it being well known that a borrower in distress would agree to any terms. "No person shall take, directly or indirectly, for the loan of money, &c. above the value of 5l. for the forbearance of 100l. for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time." They were, therefore, to consider whether the transaction between the defendant and Harris and Stratton was not, in truth, a loan of money, and the sale of goods a mere contrivance and evasion. The most usual form of usury was, his lordship said, a pretended sale of goods. He then stated the material parts of the evidence, and made some strong observations to shew, that it was not the intention of the parties to buy and sell, but to borrow and lend, and that the contract was, in truth, for a loan of money, though under the mask of a treaty for the sale of goods.

THE jury found the contract to be usurious, but if, in point of law, the plaintiffs should be intitled to recover, they assessed the damages at 222l. 10s. being the amount of the bill with the interest due upon it.

HEREUPON the case was made for the opinion of the court, which, after setting forth the bill of exchange, bearing date the 27th of October, 1778, and payable in three months, with the indorsements in blank, of Lawton and of Harris and Stratton, —stated; That the bill was given by Waller, the acceptor, to Harris and Stratton, upon an usurious contract, whereby more than legal interest was secured. That the plaintiffs took the bill from Harris and Stratton for a valuable consideration without notice of the usury.

BUT before this case was argued, Dunning in the Easter Term ensuing the trial, obtained a rule to shew cause, why there should not be a new trial, upon the ground, that the original

original transaction was not a loan, but a sale of goods, and therefore, though it might be fraudulent, it was not within the meaning of the statute of Queen Anne. And after arguments for and against the rule, the court delivered their opinion.

LORD MANSFIELD, chief justice. Before the statute of Hen. VIII. all interest on money lent was prohibited by the canon law, as it is now in Roman Catholic countries. This gave rise to many shifts and devices to evade the law. One, which was then the most common, was provided against by that statute; but the prohibition being confined to that particular sort of transactions, usurers were thereby put upon other contrivances; and experience taught the legislature, in the more modern statutes, not to particularize specific modes of usury, because that only led to evasion, but to enact, generally, that no shift should enable a man to take more than the legal interest upon a loan. Therefore, the only question, in all cases like the present, is, what is the real substance of the transaction, not, what is the colour and form. This is one of the strongest cases of the sort I ever knew litigated. It is impossible to wink so hard, as not to see, that there was no idea between the parties of any thing but a loan of money. His lordship then recapitulated the striking parts of the evidence, and observed, that the whole complexion of the case shewed, that the only purpose of Harris and Stratton was, to contrive how to get more than legal interest. They first offered part in cash; then less, playing the defendant on, in order to increase his distress; and, at last, tempted him, by an offer to conclude the business immediately, if he would take the whole in goods; assigning to the last, as their reason for this, that they could not procure the money: They did not act as persons selling goods upon credit, to be paid for at a future day; but as lending on the security of the note and the assignment of the salary. The jury therefore had done perfectly right.—The whole court being clearly of the same opinion with the chief justice, the rule obtained by Dunning for a new trial was now discharged.

AND in Trinity Term ensuing, the case before mentioned to be made for the opinion of the court was argued, and the arguments being on the 19th of June the court took till the 26th to consider, and then Lord Mansfield delivered their opinion to the following effect: We have considered this case very attentively, and, I own with a great leaning and wish on my part, that the law should turn out to be in favour of the plaintiffs. But the words of the act are too strong. Besides, we cannot get over the case on the statute against gaming, which

which stands on the same ground. This is one of those instances in which private must give way to publick convenience. It is less mischivous that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover upon the bill.—The *Postea* to be delivered to the defendant^d,

THE statutes relied on in determining those three last mentioned cases, appears to be the 9 Ann. c. 14. and 12 Ann. ft. 2. c. 16. which after briefly describing, we shall attend to three other statutes, on the construction of which, it is conceived a bill or note will be void in the hands of an indorsee, viz. Statute 5 Geo. 2. c. 30. Stat. 5 & 6 Edw. vi. c. 16. and the 7 Geo. 2. c. 8.

4. BY statute 9 Ann. c. 14. s. 1. It is enacted that, all notes, bills, bonds, judgments, mortgages, or other securities, given by any person where the whole or any part of the consideration of such securities shall be for money, or other valuable thing, won by gaming, or playing at cards, dice, tables, tennis, bowles, or other game, or by betting on the sides of such as game, or for repaying any money knowingly lent for such gaming, or lent at the time and place of such play to any person that shall play or bet^e, shall be void. But in the ninth section hereof, it is enacted that, nothing in this act shall hinder any person from gaming within her Majesty's palaces of St. James's or Whitehall, during such time as her Majesty shall be resident at either of the said palaces, or in any other royal palace where her Majesty shall be resident; so as such playing be not in any house, the freehold whereof shall be out of the crown, or in lease, and so as such playing be for ready money only.

5. BY statute 12 Ann. ft. 2. c. 16. s. 1. No person upon any contract which shall be made after the 29th of September 1714, shall take for the loan of any monies, wares, &c. above the value of 5l. for the forbearance of 100l. for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, and all bonds and assurances for payment of any money to be lent upon usury, whereupon there shall be reserved or taken above five in the hundred, shall be void; and every

^d Trin. 21 Geo. III. Doug. Rep. 736. 2 Edit.

^e It is lamentable that, for wagers even upon indifferent matters actions may be maintained. But no action will

lie for a wager respecting the mode of playing an illegal game. *Brown v. Lee-son*, Trin. 32 Geo. III. 2 H. Black. Rep. 43. Nor for it in many other cases; See 3 Durnf. & East, Rep. 693.

every person which shall receive, by means of any corrupt bargain, loan, exchange, chevifance, shift, or interest, of any wares or other thing, or by any deceitful way, for the forbearing or giving day of payment for one year, for their money or other thing above 5*l.* for 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, shall forfeit the treble value of the monies and other things lent.

6. By statute 5 Geo. 2. c. 30. s. 11. Every bond, bill, note, contract, agreement, or other security whatsoever, to be made or given by any bankrupt, or by any other person, unto, or to the use of, or in trust for, any creditor, or for the security of the payment of any debt or sum of money due from such bankrupt, at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and such bankrupt's discharge, as a consideration, or to the intent to persuade him, her, or them, to consent to, or sign any such allowance or certificate, shall be wholly void, and of no effect; and the monies thereby secured, or agreed to be paid, shall not be recovered or recoverable, and the party sued on such bond, bill, note, contract or agreement, shall and may plead the general issue, and give this act, and the special matter in evidence.

7. By statute 5 & 6 Edw. vi. c. 16. sect. 2. If any person bargain or sell any office or deputation, or any part of them, to receive money or other profit, or take any promise or assurance to have money or profit for any office or deputation, or any part of them, or to the intent that any person should have any office or deputation, or any part of them, which office shall in anywise touch or concern the administration or execution of justice, or the receipt, controlment or payment, of any of the King's treasure, revenue, auditorships, or surveying of lands, or the King's customs, or any administration or necessary attendance in the custom-houses, or the keeping of any of the King's fortresses, or which shall concern any clerkship in any court of record wherein justice is to be ministered, every such person that shall bargain or sell any of the said offices or deputations, or that shall take any money or profit, &c. shall not only lose all his right and estate in the office, or the gift or nomination of the office, but also such person that shall give any money, or make any promise or assurance for the offices, &c. shall be adjudged a disabled person to have the said office, &c.—Sect. 3. All such bargains, agreements and assurances, shall be void.—Sect. 4. This act shall not extend to any office whereof any person is seized of any estate of inheritance, nor

to any office of parkership, or of the keeping of any park, house, manor, garden, chase or forest.—Sect. 5. If any person offend contrary to this act, yet all acts done by such person by the authority of the office or deputation, before such person be removed from the office, shall be good.—Sect. 7. This act shall not extend to the chief justices of the King's Bench or Common Pleas, or to any justices of assize, but that they may do concerning offices to be granted by them, as they might have done before.

By comparing the words of those two last mentioned statutes with the two preceding, it seems not to admit of a doubt, but that the same determination would be against an indorsee in those cases as in the former. And, query, if a bill or note would not be determined void in the hands of an indorsee, if within the meaning of the following statute, though the same is silent as to securities, and only makes the contract void. See § 1. par. 1. pages, 131, 132, 133.

8. By statute 7 Geo. 2. c. 8. All contracts upon which any premium shall be given for liberty to put upon, deliver, accept or refuse, any public stock or securities, and all wagers, puts and refusals, relating to the present or future price of stock or securities, shall be void; and all premiums upon such contracts or wagers shall be restored to the person who shall pay the same, who shall be at liberty, within six months from the making such contract, or laying such wager, to sue for the same, with double costs; and it shall be sufficient therein for the plaintiff to alledge that the defendant is indebted to the plaintiff, or has received to the plaintiff's use, the money or premium so paid, whereby the plaintiff's action accrued according to the form of this statute without setting forth the special matter.

9. In *Master v. Miller*, Trin. 31 Geo. III. it was held that the alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.

In this case the first count in the declaration was in the usual form by the indorsee of a bill of exchange against the acceptor: it stated that Peel and Co. on the 20th of March 1788 drew a bill for 974l. 10s. on the defendant, payable three months after date to Wilkinson and Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts, for money paid, laid out and expended; money lent and advanced; money had and received; and on an account

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stated.

stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated that Peel and Co. on the 26th of March 1788 drew their bill on the defendant, payable 3 months after date to Wilkinson and Cooke, for 974l. 10s. "which said bill of exchange, made by the said Peel and Co. as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following to wit; "*June 23d. 974l. 10s. Manchester, March 23, 1788, Three months after date pay to the order of Messrs. Wilkinson and Cooke 974l. 10s. received, as advised, Peel, Yates, and Co. To Mr. Charles Miller. C. M. 23d June 1788.*" That Peel and Co. delivered the said bill to Wilkinson and Cooke, which the defendant afterwards, and before the alteration of the bill herein after mentioned, accepted. That Wilkinson and Cooke afterwards indorsed the said bill to the plaintiffs, for a valuable consideration before that time given and paid by them to Wilkinson and Cooke for the same. That the said bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of Wilkinson and Cooke as aforesaid, bore date on the 26th day of March, 1788, the day of making the same. And that after it so came to, and whilst it remained in the hands, of Wilkinson and Cooke, the said date of the said bill, without the authority, or privity, of the defendant, was altered by some person or persons to the jurors aforesaid unknown from the 26th day of March 1788, to the 20th day of March 1788. That the words "*June 23d*" at the top of the bill were there inserted to mark that it would become due and payable on the 23d of June next after the date; and that the alteration herein before mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange, when it was carried to and came into the hands and possession of the Plaintiffs. That the bill of exchange was on the 23d of June and also on the 28th of June 1788 presented to the defendant for payment; on each of which days respectively he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill, upon which the plaintiffs declared, &c.

This case was argued in Hilary Term last by Wood for the plaintiffs, and Mingay for the defendant: and again on the 1st of July by Chambre for the plaintiffs, and Erskine for the defendant. After which the judges delivered their separate opinions.

LORD

LORD KENYON, chief justice, in delivering his opinion says, 'The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument. For the instrument is the only mean by which they can derive a right of action. The right of action which subsisted in favour of Wilkinson and Cooke, could not be transferred to the plaintiffs in any other mode than this, in as much as *a chose in action* is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar which in point of law as well as policy ought to be applied to this case. That the alteration of this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected.—I lay out of my consideration all the cases, where the alteration was made by accident. For here it is stated that this alteration was made while the bill was in the possession of Wilkinson and Cooke, who were then intitled to the amount of it; and from whom the plaintiffs derive title: and it was for their advantage (whether more or less is immaterial) to accelerate the day of payment, which in this commercial country is of the utmost importance.—It is of the greatest importance that those instruments, which are circulated throughout Europe, should be kept with the utmost purity; and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in Ward's case [2 Str. 747. and 2 L. Raym. 1461.] whether forgery could be committed in any instrument less than a deed, or other instrument of like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it: But it was there held that the principle extended to other instruments as well as to deeds; and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from *Molloy* [*Price vs Shute* in C. iv. § x. par. 2.] indeed at first made a different impression on my mind: but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party, to whom it was directed, accepted it as payable at a different

time, and afterwards the payee struck out the enlarged acceptance ; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought ; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, “ that the alterations did not destroy the bill,” it does not affect this case : not an iota of the bill itself was altered ; but on the person, to whom the bill was directed, refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case ; at least that none is found : but I think that if it had been done by accident, that should have been found to excuse the party, as in one of the cases, where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saying that a defendant is liable, on *non-essumpfit*, if at any time he has made a promise, notwithstanding a subsequent payment ; but the question is whether or not the defendant promised in the form stated in the declaration ; and the substance of that plea is that according to that form he is not bound by law to pay. On the whole therefore, I am of opinion that this falsification of the instrument has avoided it ; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

JUSTICE ASHHURST. It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle, on which a deed would have been avoided, should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment, or in wax. And a bill of exchange, though not a deed, is evidence of a contract, as much as a deed ; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action : but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in the possession of Wilkinson and Cooke ; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them ; at all events it was their business

ness to preserve the bill without any alteration. If Wilkinson and Cooke had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody; then if the objection would have prevailed in an action brought by them it must also hold with regard to the plaintiffs, who derive title under them. For wherever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty to enquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand, should be preserved with greater purity than deeds, which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my lord.

JUSTICE BULLER, who differs in opinion from the rest of the court, says, In a case circumstanced as the present is, in which it is apparent, as found, and has been proved beyond all doubt, that the bill of exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant has the amount of the bill in his hands.—That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must anticipate me in saying that the defendant must pay it. Upon this special verdict there is no foundation for saying that any one has been guilty of forgery, nor even of fraud, as it strikes my mind. Fraud or felony is not to be presumed; and unless it be found by the jury, the court cannot imply it, *Minet v. Gibson* [in C. II. § II. par. 13.] is a most decisive authority for that proposition, if any be wanted; and I do not think there is any foundation for the distinction attempted to be taken between that case and the present. In the arguments on that case, “The question (it was said) is whether there be any rule of

“ law so reluctant that it will not recede from words to en-
 “ force the intention of the parties. I believe there is no such
 “ rule. For half a century there have been various cases,
 “ which have left the question of forgery untouched. If a
 “ bill be forged the acceptor is bound.”

THE learned judge at the conclusion of his opinion says,
 The justice, equity, and good conscience of the case of these
 plaintiffs can admit of no question; neither can it be doubted
 but that the defendant has got the money which the plaintiffs
 ought to receive. For these reasons I am of opinion that the
 plaintiffs are entitled to judgment on either of these three
 counts in the declaration, namely, on the count on the bill of
 exchange stating the date to be the 26th; or on the count
 for money paid; or on the count for money had and re-
 ceived.

JUSTICE GROSE. The only question in this case is, whether
 there appears on the face of this special verdict a right of
 action in the plaintiffs on any of the counts. The first count
 is on a bill of exchange dated the 20th of March: but, there
 being no proof of any bill of that date, there is clearly an
 end of that count. The second is on a bill dated the 26th of
 March; but the defendant objects to the plaintiffs' recovering
 on this count also, because the bill having been altered while
 it was in the hands of Wilkinson and Cooke, it is not the
 same bill as that which was accepted; and that is the true and
 only question in the cause. My idea is that the plaintiffs' right
 of action as stated in this count, cannot be maintained at com-
 mon law, but is supported only on the custom of merchants,
 which permits these particular *choses in action* to be transferred
 from one person to another. The plaintiffs, as indorseees, in
 order to recover on this bill, must prove the acceptance by the
 defendant, the indorsement from Wilkinson and Cooke to
 them, and that this was the bill which was presented when it
 became due. Now has all this been proved? The bill was
 drawn on the 26th of March, payable at three months date;
 the defendants engagement by his acceptance was, that it
 should be paid when it became due, according to that date,
 but afterwards the date was altered; the date I consider as a
 very material part of the bill, and by the alteration the time
 of the payment is accelerated several days; according to that
 alteration the payment was demanded on the 23d of June,
 which shews that the plaintiffs considered it as a bill drawn the
 20th of March; then the bill which was produced in evidence
 to the jury was not the same bill which was drawn by Peele
 and Co. and accepted by the defendant; and here the cases,
 which

which were cited at the bar, apply. Piggott's [11 Co. 27.] is the leading case; from that I collect that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and 2dly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds; but it is said that that law does not extend to the case of a bill of exchange; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is no where said that the deed is void, merely because it is the case of a deed, but because it is *not the same deed*. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instrument as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal, than in the latter case. Supposing a bill of exchange were drawn for 100l. and after acceptance the sum was altered to 1000l. It is not pretended that the acceptor shall be liable to pay the 1000l.; and I say that he cannot be compelled to pay the 100l. according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that Piggott's case only shews to what time the issue relates: but it goes further, and shews that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the court will enquire

to what time the issue relates in both cases. Then to what time does the issue relate here?—The plaintiffs in this case undertook to prove every thing that would support the *assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused; but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay another instrument; and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar that the enquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance: but granting that he did so promise, that alone will not make him liable, unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my lord on the case in *Milloy*: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this court; it only appears that there was a point made at *Nisi Prius*, but not that it was afterwards argued here. But it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world: but that is much to be doubted; for if, after an alteration of this kind, it be competent to the court to enquire into the original date of the instrument, it will also be competent to enquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange to prevent any attempts to alter them may be attended with many good effects, and cannot be productive of any bad consequences, because the party, who has paid a value for the bill, may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not

stated

stated as a fact in the verdict that the defendant received the money, the value of the bill.—Judgment for the defendant^a.

10. WHERE a promissory note had been indorsed to the plaintiff after it became due who sued the maker thereon, it was held that the latter is intitled to go into evidence to shew that the note was paid, as between him and the original payee, from whom the plaintiff received it; as in *Brown v. Davies*, King's Bench, Hil. 29 Geo. III. in which an action being by the indorsee of a promissory note against the maker, the plaintiff, at the trial before lord Kenyon at the last sittings at Guildhall, rested his case upon the proof of the maker's and payee's handwriting. The note appeared upon the face of it to have been drawn on the 6th of October 1788, payable to Sandal or order, and to have become due the 13th of November: it had Sandal's indorsement upon it; and had been noted for non-payment. Whereupon the defendant's counsel offered to prove these facts; that Sandal having indorsed it in blank, delivered it to Taddy, by whom it had been noted for non-payment. That on the 6th of December, Sandal, having been paid by the defendant, the maker of the note, took it up from Taddy, and afterwards, without the knowledge or consent of the defendant, negotiated it to the plaintiff. But his lordship being of opinion that, unless knowledge was brought home to this plaintiff, it would make no difference between these parties, rejected the evidence, and the plaintiff had a verdict.

LE MESURIER defendant's counsel, moved in this term for a rule to shew cause why there should not be a new trial, in order to let the defendant into proof of the above facts, and cited a case of *Banks v. Colwell*, at *Launceston Spring* assizes 1788 before Mr. Justice Buller. That was an action by the indorsee of a promissory note, payable on demand, against the maker. The defendant there was admitted to give evidence that the note had been indorsed to the plaintiff a year and a half afterwards; and to impeach the consideration by shewing that it had originally been given for smuggled goods; and that payments had been made upon it at several times. But though no privity was brought home to the plaintiff, Mr. Justice Buller was clearly of opinion that he ought to be nonsuited; for he said it had been repeatedly ruled at Guildhall, that wherever it appears that a bill or note has been indorsed over some time after it is due, which is out of the usual course of trade, that circumstance throws such a suspicion upon it that the indorsee must take it upon the credit of the indorser, and must stand in

^a 4 Durnf. & East, Rep. 320.

in the situation of the person to whom it was payable; and here it appeared that the consideration was illegal. Therefore he nonsuited the plaintiff. The principle of that case cannot be distinguished from the present: according to which the plaintiff must stand in the situation of Sandal with respect to the defendant, and consequently was not entitled to recover.

ERSKINE plaintiff's counsel, now shewed cause, contending that there was no evidence offered to shew that the plaintiff knew the note to have been satisfied; neither was there any circumstance attending it, which might reasonably lead a prudent man to suspect that it had; one or other of which was essentially necessary to disqualify the plaintiff from maintaining his action. For he had paid a valuable consideration for the note to the original payee in whose hands it might properly be supposed to be. And this objection does not lie in the defendant's mouth, whose negligence in not taking up the bill, when he satisfied Sandal, had left it in the power of the latter to deceive an innocent third person.

LE MESURIER said in addition to his former argument, that there was a reasonable ground of suspicion on the face of the note; for the plaintiff received it after it was due, when it appeared to have been noted.

LORD KENYON, chief justice, I think this matter ought to be further inquired into. It did not strike me at the trial that there was this suspicious circumstance on the face of the note; for if it appeared to have been noted for non-payment at the time the plaintiff received it, that ought to have awakened his suspicion, and led him to make further inquiries into the goodness of the note.—JUSTICE ASHHURST. I think the rule laid down by my brother Buller, in the case in Cornwall, is a very safe and proper one; that where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one, otherwise much mischief might arise.—JUSTICE BULLER. There is this distinction between bills indorsed before and after they become due. If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Still stronger ought that suspicion to be when it appears on the face of the note to have been noted for non-payment; which was the case here. But generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him. Upon this ground it was that, in the case in
Corn-

Cornwall, I held that the defendant, who was the maker, was entitled to set up the same defence that he might have done against the original payee; and the same doctrine has been often ruled at Guildhall. A fair indorsee can never be injured by this rule; for if the transaction be a fair one, he will still be entitled to recover. But it may be a useful rule to detect fraud whenever that has been practised. [Upon Lord Kenyon's appearing to dissent from the generality of the doctrine held by Mr. Justice Buller, he proceeded to observe] my Lord thinks I have gone rather too far in something that I have said, but it is to be observed that I am speaking of cases where the note has been indorsed after it became due, when I consider it as a note newly drawn by the person indorsing it.

LORD KENYON, chief justice. I agree with that, with the addition of this circumstance, that it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the indorsee that it had been so. But I should think otherwise if no notice can be fixed on the party; at least I am not prepared to go that length at present.

JUSTICE GROSE. If collusion should be proved between the defendant and Sandal, then the former will not be entitled to set up this objection. But at present I am of opinion that a new trial ought to be granted.—The rule made absolute ^c.

THIS point came before a court in a case of *Taylor v. Mather*. E. 27 Geo. III. B. R. which was an action by the indorsee of a promissory note against the maker. The note was indorsed sometime after it was due, and there were many circumstances which led the court and the jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial it was refused upon the merits, and Justice Buller at the same time said, it has never been determined that a bill or note is not negotiable after it becomes due; but if there are any circumstances of fraud in the transaction, and it comes into the hands of a plaintiff by indorsement after it is due, I have always left it to the jury upon the slightest circumstances to presume that the indorsee was acquainted with the fraud.—The rest of the court concurred in this opinion ^d.

§ III. AS CONCERNING bills of exchange or notes being lost, and how the loser should act for recovering his misfortune. How the loss of a bill of exchange when left for acceptance must be provided for, is shewn in C. IV. § VIII. par. 4. By statute 9 & 10 W. III. c. 17. it is provided, "that in case
any

^c 3 Durnf. & East, Rep. 80.

^d *Ibid.* 83.

any such inland bill or bills of exchange," (as heretofore mentioned in C. V. § 1. par. 1. in the former part of the act) "shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill or bills of exchange so alledged to be lost or miscarried, shall be found again." However the provision of this statute may be useless to the loser of the bill. A bill if lost and found by any person, gives him no property *against the owner*, though it does against all other persons, and the owner may have an action of trover for the bill in the finder's hands, but when it once becomes fairly transferred in the course of trade, the owner's property is from that time at an end^b. A demonstration whereof is in our ensuing section, par. 3. whereto we have referred from C. IX. § 11. par. 3. for shewing that where a bill or note is lost, or stolen, the holder must prove that he took it *bona fide* and gave a valuable consideration for it. And hence it may be perceived that in case of a bill or note being lost, or stolen, the owner for recovering his misfortune, should make his case as public as possible, whereby his property may be prevented passing unnoticed in the course of trade,

§ IV. AS to stealing bills or notes, and its being made felony by statute. Obtaining them with design to defraud. Negotiating them by an innocent person after being stolen. 1. Stealing bills of exchange, notes, &c. is felony in the same degree, as if the offender had robbed the owner of so much money; as by statute 2 Geo. II. c. 25. s. 3. if any person shall steal or take by robbery any exchequer orders or tallies, intitling any other person to any annuity or share in any parliamentary fund, or any exchequer bills, bank notes, south-sea bonds, east-india bonds, dividends, warrants of the bank, south-sea company, east-india company, or any other company, bills of exchange, navy or debentures, goldsmiths notes for payment of money, or other bonds, or warrants, bills or promissory notes for payment of money, being the property of any other person, notwithstanding any of the said particulars are termed in law *a chose in action*; it shall be deemed felony, of the same nature, and with or without benefit of clergy, as if the offender had stolen, &c. any other goods of the like value with the money due on
such

such orders, &c.—This statute is revived and made perpetual by 9 Geo. II. c. 18.

2. THUS hath the legislature provided against stealing bills of exchange, notes, &c. And to obtain a bill of exchange from an indorsee, under a pretence of getting it discounted, is felony, if the jury find that the indorsee did not intend to leave the bill in the prisoner's possession without the money, and that he undertook to discount it with a preconcerted design to convert its produce to his own use; as in the case of the *King v. Aickles*. At the Old Bailey January session 1784, John Henry Aickles was tried before Mr. Justice Heath, present Mr. Justice Ashhurst, for stealing a bill of exchange value 100l. the property of Samuel Edwards.—The following facts appeared in evidence: Mr. Edwards wishing to get his own note of hand discounted, had made application to several persons in the discounting line of business for that purpose. A few days afterwards the prisoner, a total stranger to Mr. Edwards, left an address at his lodgings while he was from home, "*Mr. H. No. 21 Great Pulney-street, from six to seven in the evening, or from eleven till twelve in the morning.*" In consequence of this address, Mr. Edwards the next morning called upon the prisoner in Pultney-street; and a conversation upon the subject of money transactions taking place between them, the prisoner told Mr. Edwards that he was in the discounting line, and would, whenever he chose, discount a bill for him at the usual premium of $2\frac{1}{2}$ per cent. agency, provided it was drawn upon and accepted by a person of known credit and responsibility. About three weeks after this interview, Mr. Edwards again called upon the prisoner; but not finding him at home, he the next day sent his clerk Mr. Croxall to enquire whether he would discount a bill of 100l. accepted by Mr. Richard Wells, of Cornhill; and requesting that he would call in the City, that he might be fully satisfied of its validity. The prisoner returned with Mr. Croxall to the house of Mr. Richard Wells, in Cornhill; where he was shewn into a Room to Mr. Edwards, who asked him the terms on which he would discount a bill for 100l. provided he approved of it. The prisoner replied, "Two and a half per cent. agency, exclusive of the legal interest for two months." Mr. Edwards immediately delivered the bill described in the indictment into the hands of the prisoner, and referred him to Mr. Richard Wells, the acceptor of it, who was there present, to satisfy him that it was a genuine acceptance. Mr. Wells said the acceptance was his handwriting. The prisoner addressing himself to Mr. Edwards said, "*Sir, if you will go with me to the west end of the town to Pultney-*

street,

"*street, I will give you the cash.*" Mr. Edwards replied, "*I cannot conveniently go with you myself, but Mr. Croxall shall attend you, and pay you the 25s. agency, and the discount on receiving the hundred pounds.*" On their departure Mr. Edwards whispered his clerk not to leave the prisoner without receiving the money; nor to lose sight of him; promising to follow them in half an hour. The prisoner and Mr. Croxall accordingly proceeded together to the prisoner's lodgings in Pultney-street. When they arrived the prisoner shewed Mr. Croxall into the parlour and desired him to wait while he fetched the money, saying, "It is only about three streets off, and I shall be back again in a quarter of an hour." Mr. Croxall however followed him down Pultney-street, but in turning the corner of Brewer-street lost sight of him. He walked backwards and forwards in the street for a length of time, in hope of seeing him return; but without success. During this interval Mr. Edwards, who had previously called at the prisoner's lodgings, came up to Croxall, and they returned together to the prisoner's lodgings, where they waited three days and three nights in a vain expectation of the prisoner's return. On the Saturday following, however, Mr. Edwards apprehended him at the house of a lady in Margaret-street, where he had dined. He expressed his sorrow for what had happened; made several apologies for his misconduct; and promised to return the bill: but he was carried before a magistrate, who committed him "*on suspicion of being a common cheat.*" It was proved that the bill had been seen a few days before the trial, in a state of negotiation in the hands of a Mr. Smith, and that a *subpœna duces te um* had been served upon him; but he did not appear, nor was the bill produced in evidence.

THE counsel for the prisoner submitted two points to the consideration of the court: 1st, That the bill itself ought to have been produced in evidence. 2dly, That the facts, admitting them to be true, do not amount to felony.

THE FIRST POINT. The bill is proved to be in existence, and it is incumbent on the prosecutor to produce it. He might have taken proper measures for this purpose before he had proceeded to trial. If the bill had been lost or destroyed, parole testimony might perhaps have been admissible; but it is a clear and settled principle of law, that parole testimony cannot be given of any existing written instrument.

SECOND POINT. To satisfy the definition of larceny, as it appears in the works of the most distinguished writers upon Crown Law, the property must be taken from the possession of another. The taking of the property itself, after it is once separated from the legal possession of its original proprietor, can
never

never become a subject capable of supporting the allegation of larceny, especially if that separation be unaccompanied by those ingredients which furnish the idea of a felonious intention. The jurisprudence of the country has adapted a distinction between those actions which are committed *animo furandi*, [with a mind or intention of stealing] and those which are the consequence of *artful contrivance*; and on this distinction depends the great difference between *felony* and *fraud*. The criterion of a *felonious intention* is where the act of taking is accompanied by such circumstances as plainly import it to have been by *constraint*, and *against the inclination* of the owner.—Hereon the prisoner's counsel proceed in their argument, and pointing out the before mentioned various circumstances of the proceedings had between him and Mr. Edwards, argue that not any one of the prisoner's transactions therein could amount to felony, and their argument when closed, was answered by counsel on part of the crown.

FIRST POINT. It is proved that the bill is in the hands of Mr. Smith, who has been served with a *subpœna* to produce it; and as he has refused to comply, parole testimony may be given of its contents. If it had been in the prisoner's possession, the next best evidence to the bill itself would have been admissible; for as a prisoner cannot be compelled, or even legally required to produce any evidence which may operate against himself, the next best evidence which it is in the power of the prosecutor to produce, is always admitted; and in the present case, the possession of Mr. Smith is to be considered as the possession of the prisoner. The principle therefore, that parole testimony cannot be given of a written instrument, unless there is a strong presumption previously raised of its being lost or destroyed, is not universal and without exception.

SECOND POINT. I am not disposed to controvert the definition which has been given of the nature of larceny. I admit that there must be a felonious taking of the property from the possession of the proprietor, and on that admission I am perfectly contented to argue the law of this case; for I am warranted by a series of uncontroverted decisions in saying, that the bill in question was, to the moment of its conversion, not in the legal possession of the prisoner, but of Mr. Edwards. I acknowledge that it is highly important to the jurisprudence of this country, that the legal distinction between fraud and felony should be preserved; but it would bring a contempt on the justice of the nation, to suffer its laws to be evaded by such little contrivances as the prisoner made use of to obtain the bill. A man goes to Smithfield-market and cheapens a horse, which the owner delivers

livers to him for the purpose of trying its paces. Upon this occasion the common understanding of mankind would perhaps decide that the *actual possession* of the owner was determined and gone by the delivery; but in the contemplation of law, if it shall afterwards appear that the possession was obtained with intent to steal it, the delivery will not alter the *legal possession*. The case of *Sharplefs* about nine years ago at this place, will confirm the doctrine for which I contend. Sharplefs went to the shop of a hosier, and ordered a quantity of goods to be sent to his lodgings. The hosier with proper caution ordered the servant not to leave the goods without the money. Sharplefs, however, contrived to send back the servant and keep the goods, which he afterwards converted to his own use, and the JUDGES determined, that this was a felonious taking. The same principle is, if possible, more strongly recognized in two cases determined very lately. FIRST, the *King v. Patch*. A man drops a ring, and on pretence of dividing its produce with some by-stander, he picks it up, and then delivers it to the object of his design, taking as a security for his proportion of its value, a watch, or a clock, or any other thing, which he converts to his own use. Here there is something given for the thing stolen, and this has frequently been determined to be felony; and yet after the watch or clock are delivered, it is impossible to say that the actual possession is not changed.

THE second case is the *King v. Pares*, which a very short time since received the solemn determination of all the JUDGES of ENGLAND. A man hires a horse, on pretence of taking a distant journey into Essex. In point of fact he never takes such a journey, but sells the horse: this is determined to be felony. But I have troubled the court with more cases than it was necessary to have cited in support of so clear a position; and I shall therefore only state one more, in answer to the observations which have been made, to prove that the possession was parted with when the note was delivered. A man goes to a public-house and orders a pot of beer and change of a guinea to be sent to the house of Mr. Stiles; and when it was brought he sends the servant back on some pretence, takes the change, and goes off. Had the publican who remained in his house any more controul over, or actual possession of his money, than any man who hears me? And yet this court has with great wisdom held, that this taking is felony. But it is asked, at what period of time the felony in the present case can be said to have commenced? I answer precisely at the same period of time in which it commenced in the cases I have cited. In *Pares'* case, it commenced the instant in which he put his foot
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in the stirrup with an intent to steal the horse: so here the felony commenced at the instant in which the prisoner got the note into his hand, with a felonious intent to convert it to his own use.

THE COURT left the case with the jury to consider, *first*, whether they thought the prisoner had a preconcerted design to get the note into his possession, with an intent to steal it? and *secondly*, whether the prosecutor intended to part with the note to the prisoner, without having the money paid before he parted with it? They found the affirmative of the first question, and the negative of the second; and concluded that the prisoner was therefore GUILTY.—The judgment was respited, and the following questions referred to the consideration of the TWELVE JUDGES.

FIRST, Whether as the bill in question had not been produced, the parole testimony which had been given concerning it was legally received? SECONDLY, whether the prisoner was guilty of *felony*, under all the circumstances of this case?

THE JUDGES met at Serjeant's Inn Hall to consider of this case; and they were unanimously of opinion, that the parole testimony had been properly received; and as the jury had found a preconcerted design in the prisoner to steal the note, he had been legally convicted of felony.—In the July session following, he received sentence to be transported to America, for the term of seven years^a.

3. HENCE may be seen how the law has provided against theft; and now we shall proceed to treat on the negotiating by an innocent indorsee; as that, if a bill of exchange with a blank indorsement be stolen and negotiated, an innocent indorsee shall recover upon it against the drawer, as in *Peacock v. Rhodes and another*, Easter, 21 Geo. III. in an action upon an inland bill of exchange, which was tried before Mr. Justice Willes at the last spring assizes for Yorkshire, a verdict, by consent, was found for the plaintiff, subject to the opinion of the court on a special case stating the following facts.

THE bill was drawn at Hallifax, on the 9th of August 1780, by the defendants, upon Smith, Payne, and Smith, payable to William Ingham, or order, 31 days after date, for value received. It was indorsed by William Ingham, and was presented by the plaintiff for acceptance and payment, but both were refused, of which due notice was given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at Scarborough, received the bill from a man not known, who called himself William Brown, and, by that name, indorsed the bill to the plaintiff, of whom

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he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at Scarborough, and paid him that bill; the value whereof the plaintiff gave to the buyer in cloth, and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. William Ingham, to whom the bill was payable, indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher received it from John Daltry; and it was stolen from Joseph Fisher, at York (without any indorsement or transfer thereof by him), along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of Ingham.

MR. WOOD, counsel for the plaintiff, hereon argued, that the bill was taken by Peacock, in the ordinary course of business, and there was no pretence that he had notice that it had been obtained unfairly. If he had, he admitted that he could not recover. A bill indorsed by the payee, is to be considered to all intents as cash, unless he chuses to restrain its currency, which he may do by a special indorsement [as shewn in C. VI. § 1. § 11.]. The very object in view, in making negotiable securities, is, that they may serve the purpose of cash. The case of *Miller v. Race*, [in C. IX. § vi.] the question there arose upon a bank note, established the principle just stated. If this bill had not been stolen, but lost, the owner might have maintained trover against the finder, but still the *bona fidē* holder would have been intitled to recover upon it. This was determined, with respect to a note upon a banker payable to A. or bearer, in the case of *Grant v. Vaughan*, [in C. VI. § v.]. Here the bill was indorsed blank, but that was the same thing in effect, as if it had been made payable to the bearer. A blank indorsement is an indorsement to all the world; to any body who shall happen to be the bearer. There was a case of *Francis v. Mott*, directly in point to the present, tried before lord Mansfield two or three years ago: There a bill with blank indorsements had been picked out of the holder's pocket, at Manchester races, being offered in payment to a house at Manchester, who did not know the persons whose names appeared upon it, they sent to enquire about their credit, and finding them responsible, they gave a valuable consideration for it, and sent it to their correspondent in London. He carried it to the drawee for acceptance, who detained it, and said it was stolen upon which the house at Manchester brought an action against the drawer, and the plaintiff recovered.

MR. FEARNLY, counsel for the defendants, arguing that the cases on this subject though all modern, yet all of them established a distinction between bank notes, or bankers cash notes

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payable to bearer, and indorseable bills or notes, cited a variety of cases; and at the conclusion of his argument says, the arguments from inconvenience are in favour of the defendants. No man is obliged to take a bill of exchange in payment. A trader should not, in prudence, take a bill, unless he knew the person from whom he received it. But, if the law were as contended for on the part of the plaintiff, the temptations to theft would be increased.

LORD MANSFIELD. I am glad this question was saved, not from any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder coming fairly by a bill or note, has nothing to do with the original transaction between the parties, unless, perhaps, in the single case, (which is a hard one, but has been determined,) of a note for money won at play [heretofore treated on in § II. par. 2.]. I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and therefore, the case is clear, and within the principle of all those Mr. Wood has cited, from that of *Miller v. Race*, downwards, to that determined by me at *Nisi Prius*. The *Posse* to be delivered to the plaintiff^d.

WITH respect to what is above mentioned, as that the law is settled, that a holder coming fairly by a bill or note, has nothing to do with the original transaction between the parties. In the case of *Lirkbarrow v. Mason*, Mich. 28 Geo. III. By Mr. Justice Ashurst in delivering his opinion in this case: Between the drawer and payee of a bill of exchange the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is because it would be enabling either of the original parties to assist in a fraud. This rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that in-

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dorsement

^d Doug. Rep. 633. 2 Edit.

dorsement is a question of law, which is, that as between the original parties the consideration may be enquired into, though when third persons are concerned it cannot*. But hereto are exceptions, as in the abovementioned case of a note for money won at play; so in the case of a bill or note obtained on a usurious consideration, and other cases heretofore treated on in § II.

§ v. CONCERNING forging bills or notes. Uttering the same under false representations. 1. By statute 2 Geo. II. c. 25. If any person shall falsely make, forge or counterfeit, or cause to be falsely made, &c. or willingly assist in the false making, &c. any deed, will, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note, &c. or any acquittance or receipt for money or goods, with intention to defraud any person, or shall utter or publish as true, any false, forged, or counterfeited deed, will, &c. with intention to defraud, &c. knowing the same to be false, &c. every such offender shall be guilty of felony without benefit of clergy. And by statute 7 Geo. II. c. 22. if any person shall falsely make, alter, forge or counterfeit, or willingly assist in the false making, &c. any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or other security, for money, or any warrant or order for payment of money or delivery of goods, with intention to defraud any person, or shall publish as true any false, &c. acceptance of any bill of exchange, or accountable receipt, warrant or order, with intention to defraud any person, knowing the same to be false, &c. every such person shall be guilty of felony without benefit of clergy.

By statute 18 Geo. III. c. 18. made to explain the act 7 Geo. II. c. 22. it is enacted, that if any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in the false making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intent to defraud any corporation whatsoever; or shall utter or publish, as true, any false, altered, forged, or counterfeited acceptance of any bill of exchange, or accountable receipt for any note, bill or other security, for payment of money or delivery of goods, with intention to defraud any corporation whatsoever, knowing

* 2 Durnf. & East, Rep. 71.

knowing the same to be false, altered, forged, or counterfeited ; every such person shall be guilty of felony, and shall suffer death as a felon without benefit of clergy.

2. By the abovementioned statutes may be perceived how the legislature hath in various instances provided against wilful forgery ; and here it may be observed that, besides those, there are a multitude of other statutes which inflict capital punishment on forgeries, and are commented on, and cited by the learned Sir William Blackstone ^b, who concluding his comment thereon says, “ I believe, through the number of “ these general and special provisions, there is now hardly a “ case possible to be conceived, wherein forgery, that tends to “ defraud, whether in the name of real or fictitious persons, is “ not made a capital crime.”

3. FOR an illustration of this we shall now proceed to relate various cases pertaining hereto ; as that forgery may be committed by making *a mark*, in the name of another person, appears by the case of *Elizabeth Dunn*, who at the Old Bailey September Session 1765, was indicted before James Eyre Esq. Recorder, for forging a promissory note for the payment of money, in the words and figures following :

“ July 27, 1765.

“ I promise to pay to Mr. *Edward Hooper*, or order, the “ sum of three (*omitting the word pounds*) thirteen shillings and “ sixpence, seven days after date, value received.

“ *Witness John Whettall.*” Mary Wallace, + her mark.”

with intention to defraud the said Edward Hooper. And it was also laid in the indictment, with intention to defraud the person intitled to receive the money due to *John Wallace*, late seaman on board his Majesty's ship *L'Epreuve*.

It appeared on the evidence, that Mr. Hooper was a prize-agent, and that the prisoner applied to him with the probate of a will, in consequence of which he made search, and found there were wages due to John Wallace ; but he refused to pay her until she produced a certificate of her identity. She however pleaded poverty, and prevailed on him to lend her five shillings. She afterwards produced the certificate ; but as the money could not be immediately got, she begged he would let her have a little more. In consequence of her importunity, he advanced three guineas and a half. He then wrote the body of the note, and called his lad, who saw her make her mark. She then said her name was Mary Wallace, and Hooper then wrote Mary Wallace her mark, and his lad witnessed it. It

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was clearly proved that her name was Elizabeth Dunn, and not Mary Wallace.

THE JURY found her guilty; but her case was reserved for the opinion of the Judges, and she was ordered for execution in the December sessions following^c,

4. THAT it is felony to forge the name of a person, although such person never existed, appears in the case of *James Bolland*, who at the Old Bailey in February session 1772, was tried before James Eyre, Esq. Recorder, present Mr. Justice Nares, for forging on the back of a promissory note, for the payment of money, drawn by one Thomas Bradshaw, and indorsed by one Samuel Pritchard; a certain indorsement in the name of James Banks, with intent to defraud Francis Lewis Cardeneaux.—The note was in the words and figures following:

“ £.100.

LONDON, 12 October, 1771.

“ Two MONTHS after date, I promise to pay to Mr. Samuel

“ *Pritchard* or order, One Hundred Pounds value received.

“ Charles-street, Covent-Garden. T. BRADSHAW.”

HE also stood charged for uttering and publishing as true the said forged indorsement of the name of James Banks, knowing the same to be forged with the like intention.

THE JURY found the prisoner guilty of uttering and publishing the bill, knowing it to be forged; but the court respited the judgment; and it was submitted to the consideration of the twelve Judges, whether, under all the circumstances of the case, Bolland had been guilty of forgery within the meaning of the statute of 2 Geo. II. c. 25.

THE following circumstances appeared in evidence. In the month of October 1771, Bolland, one Jesson, and a Mr. Lilburne, met at the George and Vulture Tavern in Cornhill, in a public-room. Jesson asked Bolland when he would settle a note of fifty guineas, before discounted by Jesson for Bolland; Bolland immediately produced the present note for 100l. drawn by Bradshaw payable to Pritchard and indorsed “James Bolland,” and asked Jesson to discount it. Jesson upon observing Bolland’s indorsement, told him, that as his name was on the back of it, he could not negotiate it; that he knew Bradshaw and considered him as a good man; but that he did not chuse to put his (Jesson’s) name on the same paper with Bolland’s. Bolland replied, “I can take off my name.” Immediately Mr. Lilburne took up one of the table-knives, with intention to erase all the name; but when he had erased all but the initial B, for he began at the last letter of the name,

Bolland said, "Don't scratch it all out for it may disfigure it, or cancel it by scratching a hole in it; I will think of some other name that begins with a B;" and he immediately filled it up with "ANKS," which made the name BANKS. When this was done he returned the note to Jeffon, who put it into his pocket, saying, "I shall give it to a particular friend of mine, and he will undoubtedly ask me who Banks is." To this Bolland replied, "BANKS is a publican or victualler, and lives near or in Rathbone Place."

THE ensuing day Jeffon applied to Mr. Cardeneaux, to get this bill discounted; and on the Saturday morning following Jeffon and Bolland went to a Coffee-house, and sent for Cardeneaux; who when he came told Bolland that it was not convenient to him to give the whole in cash, upon which Bolland produced another bill of 10*l.* 10*s.* and Cardeneaux gave him his note for 50*l.* and a draft upon his banker for 44*l.* 5*s.* which with 15*l.* 16*s.* he had paid before to Jeffon on the credit of the bill, and 9*s.* discount, made up the 110*l.* 10*s.* for both the bills.

CARDENEUX never desired Bolland to indorse the bills; because Jeffon had told him when he gave him the 100*l.* bill, that it was better his name should not appear upon it, he having been formerly a Sheriff's officer; and that the bill would not pass properly at the bankers with his name on it.

BEFORE the bill became due, both the drawer Bradshaw and the payee Pritchard became bankrupts. Upon these events Cardeneaux applied to Jeffon for a direction to Bolland; and having got it, he said to Bolland, "That bill I discounted for you will not be paid." Bolland with an air of astonishment said, "What bill? I never discounted a bill with you, Sir, you mistake me. My name is James Bolland. I never saw you in my life, and you have no bill with my indorsement on it." And when Cardeneaux insinuated that he was acquainted with his having altered the name, he treated the idea of its being a forgery with the most supercilious contempt.—When the bill became due Bolland refused to pay it, and Cardeneaux put it into the hands of a Mr. Morris in order to obtain the money.

WHILE things remained in this situation, Mr. Levi, an attorney, two of whose clients Bolland had deceived, got intelligence from Pritchard of the alteration of the name of "Bolland to that of BANKS," and he applied to Cardeneaux to prosecute, to which Cardeneaux consented. To obtain the note, Levi by the desire of Cardeneaux gave Mr. Morris an undertaking to deliver up, or to be accountable to him for the bill. Levi apprehended Bolland, and on his being committed by Sir John Fielding deposited the note with Sir John's clerk, who produced it at the trial.

AFTER Bolland's commitment, a person brought the *rool*. to Mr. Cardeneaux, in the name of James Banks, and he gave him a receipt, the form of which the person brought with him, in the name of James Banks, containing a promise to deliver up the bill on demand; the bill being then in the custody of the Magistrate. But it did not appear that there ever was in fact such a person existing as James Banks of Rathbone-place.

THE opinion of the Judges upon this case was never publicly communicated. The principal doubt seems to have been, Whether forgery can be committed in the name of a person who never had existence?—BOLLAND was executed at Tyburn on the 18th May 1772^d.

5. THAT a person may be indicted and suffer capital punishment for forging a last will and testament although the supposed testator is alive, appears in the case of *John Cogan*, who at the Old Bailey in May Session 1787, was indicted on the statute 2 Geo. II. c. 25. for uttering and publishing as true a certain forged *Will and Testament*, purporting to be the last Will and Testament of James Gibson, &c. Upon the trial of this indictment it appeared that James Gibson, whose will was charged to be forged, was alive, and produced as a witness; and Mr. Justice Wilson before whom it was tried, being in some doubt, whether, under these circumstances, an instrument bearing the similitude of a last will, could be considered within the meaning of the statute upon which the indictment is founded. The case was laid before the TWELVE JUDGES, and on mature deliberation they decided that the doubt was without foundation, and were all of opinion that if a forged instrument *purporting* to be a last will and testament, be uttered and published as a true last will and testament, under circumstances manifesting an intention to defraud, it is equally within the meaning of the act of Parliament, whether the supposed testator be in fact alive or dead. This opinion is founded on the authority of several cases, whereof the before mentioned case of *Bolland* is one, another that of *Timothy Murphy*, who was tried at the Old Bailey in the year 1753, for forging a seaman's will; and though the man whose will was forged was alive, he was convicted and executed. Likewise there are some other cases mentioned by Mr. Leach; on the authority of which this opinion is founded^e.—In consequence of this determination the prisoner received judgment of death^f.

6. THAT to indorse a bill in a *fictitious name* is forgery, although the money might have been as well obtained by indorsing it in the *real name* of the person who uttered it, appears in the case of *Edward Tuft*, who at the Lent Assizes for the county

of

^a Leach's Cases, 83.

^e *Ibid.* 392.

^f *Ibid.* 393.

of Leicester 1777, was tried before Mr. Justice Nares, for forging an indorsement on a bill of exchange. The jury found the prisoner guilty; but the learned and humane Judge, cautious of passing sentence of death in a case which admitted of doubt, submitted to the consideration of the TWELVE JUDGES, whether, upon the following state of the facts, the conviction was proper?

THE bill of exchange was the property of one William Whetheral, out of whose pocket it had been picked or lost, with other things, at Leicester races. The prisoner had the very same night endeavoured to negotiate it at Leicester; but being disappointed, he proceeded to Market Harborough, where he bought a horse of one John Ingram, the landlord of the inn, and offered him this bill to change. The landlord not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorsed it, and that if he (the landlord) would put his name on the back of it, it should be immediately discounted. The landlord however not knowing the person from whom he had received it, refused to indorse it; but told the clerk, that the gentleman was then at his house, and he would go and fetch him: accordingly he did, and the prisoner indorsed the bill by the name of "*John Williams*," which was not his own name, and the banker's clerk after deducting the discount, gave him the cash for it. The prisoner, in his defence, said he had found it.

THE JUDGES were unanimously of opinion that this was a forgery; for although the fictitious signature was not necessary to his obtaining the money, and his intent in writing a false name was probably only done to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it. The one lost the chance of tracing his property and the other lost the benefit of a real indorser if, by accident, the prior indorsement should have failed.

7. IN the case of *Wilkes*, one Wilkes drew a bill in a fictitious name upon a fictitious drawee, in favour of a real payee, in payment for goods sold. He was first indicted for the cheat at Launceston, and acquitted. The case being stated to the Judges, they were all of opinion that the transaction was a forgery within statute 2 Geo. II. c. 25. He was afterwards indicted again for forgery having drawn another bill under the same circumstances, and tried before Mr. Justice Yates at *Bodmin* August 1767, but again acquitted^b. [Q. if agreeable to the direction of the Judge.]

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§ Leach's Cases, 182.

^b 1 H. Black. Rep. 588.

8. THAT a receipt indorsed on a bill of exchange in a fictitious name, is a forgery, although it does not purport to be the name of any particular person, appears in the case of *John Taylor*, which resembles the before mentioned case of *Edward Tuft*. At the Old Bailey in October Session 1779, John Taylor was tried before Mr. Justice Willes, present Mr. Baron Eyre, for that he having in his possession a bill of exchange, &c. set forth in the bill of indictment to be drawn 2d August 1789, by *Thomas Harper* on *Joseph Cuff*, for twenty pounds payable to the drawer or order one month after date; and that John Taylor feloniously did make, forge, and counterfeit a receipt and acquittance for the said sum of twenty pounds, as followeth, "Recd. W. Wilson" with the intention to defraud the said Joseph Cuff. And in the bill of indictment was a second count for uttering with the like intention; and a third and fourth count for forging and uttering it with intention to defraud John Briggs and Henry Sutton.

UPON the bill being produced, it appeared that "Thomas Harper," the drawer and payee, had indorsed it over, by a special indorsement, to "Bird and Jones," who had indorsed it *in blank*, and paid it away to Mr. Sutton, a London tradesman then at Birmingham, who indorsed it with five other bills, in the presence of the prisoner, in a letter directed to Messrs. Briggs and Sutton, on Garlick-hill; and which letter was put into the post-house at Birmingham; but it never arrived as directed in London. Mr. Briggs, on receiving advice of these bills having been sent, applied to Mr. Cuff to stop payment of the bill in question; but Mr. Cuff had paid the bill, though it then wanted three days of being due.

To prove that it was the prisoner who had received the 20l, and witnessed that receipt in the name of "W. Wilson," the counsel for the prosecution called Mr. Cuff; but the court concurred with the prisoner's counsel that he was not a competent witness; for he had, by paying the bill before it became due, opened a question, whether he was not liable to repay the money¹. On receiving a release however from Sutton and Briggs, the indorfees of the bill, his evidence was received. [It was doubted whether Mr. Cuff ought not to have released the drawer.]

THE EVIDENCE for the prosecution being closed the prisoner's counsel submitted to the court, that it was essential to the commission of forgery that the act should be done in the name of another: [he cited 3 Inst. 169.] but that in the present case, for any thing that had appeared to the contrary, there never was such a person existing as the "William Wilson" whose

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¹ As to this see hereafter, C. IX. § 1. par. 1. 2.

name was supposed to have been forged. It was also submitted, that, that name could not have been used with an *intention to defraud*, because the prisoner might as well have procured payment of the bill by writing the receipt in the name of "John Taylor" as in the name of "William Wilson;" and therefore the use of the fictitious name was not necessary to the accomplishment of any fraud.

THE COURT however over-ruled both objections, and the Jury found the prisoner *guilty*; but the judgment was respited, and the case referred to the consideration of the TWELVE JUDGES, who were unanimously of opinion, That the prisoner was properly convicted ^k.

9. THAT to indorse a bill by a person of the same name with the payee, and such person knowing that he had no interest in the bill, and indorsed it with intent to defraud the real payee, is the same as putting a different name with intent to defraud; as in the case of *John Dean*, who was tried before the Recorder at the Old Bailey Sessions, September 1792, on an indictment for forging an indorsement on a bill value 50l. The first count in the indictment stated that the indorsement was made with an intent to defraud Richard Dean, of India; and the second, that it was made with an intent to defraud Batson and Co, (the bankers who discounted it).

THE circumstances of this case were as follows: A Mr. Richard Dean in India sent the bill of exchange in question, and also two others (the one for 200l. drawn by John Turner on John Perry; and the other for 500l. drawn by W. Walters on Sir Edward Hughes, of Portland-place) inclosed in two letters to his brother John Dean, in London; they were directed to No. 9, Castle-street, Long Acre. The prisoner, whose name was John Dean, had lodged in that house, but had left it before the letters arrived.—John Dean, the brother of Richard Dean, had lived at No. 8, Castle-street, Long Acre, but had removed to the parish of Mary-le-bone, before the arrival of the letters from his brother. As the letters containing the bills were directed to John Dean, No. 9, Castle-street, Long Acre, the letter-carrier for that quarter never called at No. 8;—and after much enquiry the prisoner was discovered: he lodged at a porkshop in Drury-lane. When he received the letters from the letter-carrier he observed he had relations in India, and had before that time been in expectation of remittances. Two letter-carriers proved that they had delivered five letters to him, in two of which were these orders for money. The prisoner himself did not pretend to deny the fact; he admitted, without the least hesitation, that he had received
all

^k Leach's Cases, 216.

all the letters and drafts, and had negotiated them; but in his defence, he said, he had a father and brother in India, and that he had long expected to have received remittances from them.

AFTER arguments by counsel in this case, Mr. Recorder in his charge to the jury observed, that the question for their consideration was very different from that which often arose in cases of forgery. For there was no doubt in this case of the fact, if the gentlemen of the jury believed the witnesses. It was clear that the prisoner made the indorsement, which was often a matter of difficulty. The prisoner made the indorsement in the presence of another person; and therefore the question, and the only question, and a very serious one it was for the public on the one hand, and for the prisoner on the other, was, whether at the time he made the indorsement he knew he had no interest in this bill whatever? whether he knew at the time that this bill was not directed to him, that it was certainly intended for another person?

THE law of the case was perfectly clear, though the prisoner's name was John Dean, as well as the name of the person for whom the bill was intended; though the prisoner happened to have the same name, yet if he assumed a character which did not belong to him, if he assumed the name of the man who was responsible for the bill, under these circumstances he was as guilty of forgery as if he had put on the bill a different name from that of John Dean, whether he had a right to negotiate it or not; the jury would not impute a crime to him unless they perceived a criminal intention. If there were no circumstances in the case from which they could infer that he might reasonably suppose these bills and the letters were intended for him, they would acquit him; if not, they would find him guilty.—The jury immediately found the prisoner guilty, and afterwards sentence of death was passed on him¹.

10. THAT uttering an order for the payment of money under a false representation, is evidence of knowing it to be forged, and renders the offender liable to capital punishment, appears in the case of *John Sheppard*, who at the Old Bailey in September Session 1781, was tried before Mr. Justice Ashurst, for uttering the following order for payment of money, knowing it to be forged, with intention to defraud James Elliot.

Green-street, 31st July, 1781.

“ MESSRS. BROWN and COLLINSON, Pay to *Mr. John Atkins*, or bearer, six pounds six shillings for

“ H. Turner.”

THE

¹ September, 1792. See more concerning a forgery, in the case of *Mead v. Young*, hereafter in C. IX. § 11. par 1.

THE following facts appeared in evidence: The prosecutor was a silversmith; and the prisoner having looked out several goods at his shop to the amount of six guineas, pulled out his purse, saying, "I believe I have not cash enough about me, but here is a draft on a banker, which is the same thing as money; it will be paid when presented." He laid the draft on the counter, and desired to see some silver spurs; but the prosecutor not having any of the kind which he described, the prisoner said, "Then you must send me a pair." The prosecutor took his order-book, and imagining the prisoner's name to be the same as that in which the draft was signed, he wrote, "H. Turner, Esq." The prisoner looked over him, and desired him to add, "Junr. Noah's Row, Hampton Court," and then went away. It appeared that no person of the name of H. Turner kept cash at Brown and Collinson's, or lived in Green-street; nor could such a place as Noah's Row, or such a person as H. Turner, junr. be found at Hampton Court.

THE jury found the prisoner *guilty*, and he received judgment of death: but the execution of the sentence was respited, and the propriety of the conviction submitted to the consideration of the JUDGES.—In January Session 1782, the prisoner was put to the bar, and informed by Mr. RECORDER, That the TWELVE JUDGES were unanimously of opinion, that the conviction was legal. The prisoner however received a conditional pardon, in consequence of the long confinement he had suffered; and he was sentenced [by virtue of 19 Geo. III. c. 74.] to raise gravel for three years on the river Thames^m.

II. WHAT shall be considered as an order for the delivery of goods, or payment of money, within the meaning of the statute 7 Geo. II. c. 22. is demonstrated in the three following cases; the *first* of which is, that of *Lockett*, who at the Old Bailey in June Session 1772, was tried before Mr. Baron Perrot, present Mr. Justice Aston, for forging an order for payment of money, and also for uttering it knowing it to be forged, with intention to defraud one John Scholes, &c. The order was in the words and figures following:

" London, February 14, 1772.

" Messrs. Neale, James, Fordyce, and Down, PAY to Mr.
" William Hopwood, or bearer, sixteen pounds ten shillings and
" six pence. " R. VENNIST."

" £ 16 : 10 : 6 "

THE prisoner went to the shop of Mr. Scholes a colourman, and bargained for a quantity of goods, amounting to 10l. os. 6d. He desired a bill might be made out, and said he would call in
the

the afternoon and pay for them. He went away and took a small parcel of Prussian blue with him. He returned in the afternoon, seemingly in a great hurry; said his name was William Thompson, and that he lived at Ware in Hertfordshire. He presented the order to pay for the goods, and Mr. Scholes gave him six pounds ten shillings in difference; but on presenting it for payment, no man of the name of R. Vennist had ever kept cash at the house of Neale, James, Fordyce, and Down.

THE jury found the prisoner *guilty* of uttering the order knowing it to be forged; but as it appeared that no man of the name of Vennist had ever kept cash with these bankers, it was doubted whether this was an order for the payment of money within the meaning of the 7 Geo. II. c. 22. The principle of the case of Mary Mitchell in Mr. Justice Foster's Reports [hereafter again mentioned] being, That the person who is supposed to give the order ought to possess some interest in, or a disposing power over the money or goods which is the subject matter of it.

UPON this doubt the case was referred to the consideration of the Judges; and they were unanimously of opinion, That it was an order for the payment of money within the meaning of the statute, for although no man of the name of Vennist had in fact ever kept cash at Fordyce's banking-shop, yet the nature of the order assumes that there was cash there in the name of the drawer which he had taken upon him to transfer to the person in whose favour the order is made.—The prisoner received sentence of death on the last day of September Session 1774^a.

THE second of the abovementioned three cases is, that of *George Williams*, which was a case reserved from the Summer Assize for the county of Southampton 1775, for the opinion of the TWELVE JUDGES. The indictment was for forgery; and the question was, Whether the following order was an order for the delivery of goods within the meaning of the statute of 7 Geo. II. c. 22.

" SIR,

Monday, 3d July, 1775.

" PLEASE to let the bearer, *Captain George Williams*, have
" twelve barrels of tar; and in so doing you will oblige,

" Your servant to command,

" To Mr. Guildmare,

" *William Robinson.*"

" GOSPORT."

MR. ROBINSON, whose name was forged, was a customer of Messrs. Lys Sketley and Guildmare, merchants in Gosport; but

^a Leach's Cases, 97.

but it did not appear that he was the owner of, or had any special interest whatever in the twelve barrels of tar which the order was calculated to procure.

THE JUDGES were unanimously of opinion, That this was not an order for the delivery of goods within the meaning of the statute. The case of *Mary Mitchell*, in Mr. Justice Foster's Reports, 119. they said, had been decided upon serious argument by a great majority of the JUDGES, and therefore the principles there laid down could not now be departed from; but most of them were of opinion, That had the present case been *res integra*, they should have thought it within the statute, for the wording of the order was not by any means so strong as that in the case of *Mary Mitchell*°.

THE third and last of the abovementioned three cases is, that of *Ellor* at the Old Bailey May Session 1784. This was an indictment on the statute 7 Geo. II. c. 22. for forging a certain order for the payment of money.

“ MESSRS. SONGER,

“ PLEASE to send TEN POUNDS by the bearer, I am so ill I
“ cannot wait on you. ELIZABETH WERY.”

THE COURT. The Act of Parliament means such an order for the payment of money, as, if genuine, the party giving had a right to make; but this appears to be a mere letter, rather requesting the loan of money than ordering the payment of it. The terms of it do not import any thing compulsory on the part of the drawee to pay it; and in the case of *Mary Mitchell*, it was determined by nine JUDGES against one, That the order was not within the meaning of the act, because the directions of it were not positive, and the terms of it did not import that the party giving it had a right to the goods ordered.—The prisoner was acquitted of *the felony*, but detained and convicted of the misdemeanour P.

12. THAT in an indictment for forgery of a bill of exchange, the bill may be given in evidence, although it is not stamped pursuant to 23 Geo. III. c. 49. and the offender suffer capital punishment, appears in the two cases we shall now relate; as in the case of the *King v. Hawkeswood*, and the case of *John Lee*. At Worcester Lent Assizes 1783, *Hawkeswood* was indicted for forging a negotiable bill of exchange, purporting to be drawn by one *Prattington* on *Sir Robert Herries and Co.* And also for forging two indorsements on the same; one in the firm of *Cox and Devey*, the other in the name of *John Hadur*. There were also contained in the bill of indictment
the

° Leach's Cases, 118.

² Ibid. 299.

the usual counts for uttering the bill of exchange knowing it to be forged.

THE fact of its being a forgery, and that the prisoner had negotiated it with a complete knowledge of that fact, were very clearly proved; but upon producing the bill in evidence, it appeared not to be stamped pursuant to the statutes of 23 Geo. III. c. 49. s. 14. and 23 Geo. III. c. 58. s. 11. which enact, "that no bill of exchange, &c. not stamped as those acts direct, shall be pleaded and given in evidence in *any* court, or admitted in *any* court to be good, or available in law or equity."

MR. BALDWIN, the prisoner's counsel, submitted to the court that the instrument in question, even supposing it to be genuine, was not a lawful *bill of exchange*, but a piece of waste paper, incapable of becoming the subject either of a fraud or felony; that the party who took it, must at the time have known that it was not a legal *bill of exchange*, or he must have been grossly negligent, for the defect is visible on the face of it.

MR. JUSTICE BULLER, before whom the prisoner was tried, held, that the stamp acts abovementioned being revenue laws, and not purporting to alter the crime of forgery, could not affect the present question; and the jury found the prisoner *guilty*, but being a new point the judgment was respited, and the case was reserved for the consideration of the Judges.—In Easter Term 1783, the JUDGES over-ruled the objection, and determined that the conviction was right¹.

JOHN LEE, in January Session 1784, was indicted for forging a bill of exchange, purporting to be made by *Lord Townshend*, Master General of the Ordnance, and an objection was taken against producing it in evidence, because it was not stamped: but upon the authority of the decision in *Hawkeswood's case*, the objection was over-ruled; and the prisoner was condemned and executed².

§ VI. HAVING demonstrated how forgeries may be committed, and the punishments consequent thereon, we shall now attend to the effect of forgery as to an innocent holder, and then to discounting bills and notes.

1. In an action against the indorser the plaintiff need not prove the drawer's hand, for if it be a forged bill, yet the indorser is liable³. And an innocent holder of a forged bill of exchange, for which he has given a valuable consideration, shall recover against the acceptor who accepted it not knowing of the forgery, and drawee of a forged bill who accepts and pays, or pays it only, cannot recover back against the payee. In the case

¹ Leach's Cases, 246.

² Ibid. 247.

³ Law of Nisi Prius, 273. Edit. 1785.

case of *Price v. Neale*, King's Bench, Mich. 3 Geo. III. in an action for money had and received for plaintiff's use. On *non assumpsit* pleaded, verdict was given for plaintiff, on this special case.

A BILL of 40l. was drawn in the name of one Sutton, on the plaintiff, dated 22d November 1760, which in the course of trade was indorsed to the defendant, for a valuable consideration, and notice of it left at the plaintiff's house the day it became due. Plaintiff sent his servant to take up the bill; who did so, and paid the money. A second bill was drawn 1st February 1761, on plaintiff, in the same name, which plaintiff accepted, and wrote an order thereon, for his banker to pay it; and being so accepted, it was indorsed to the defendant for a valuable consideration, and was paid by such order of the plaintiff. It appeared afterwards, that both bills were forged by one Lee, who was since hanged for other forgeries, as shewn in the preceding section, par. 12. The defendant acted innocently and *bona fide*, without the least privity or suspicion, and paid the full value of both bills. The question was, whether the plaintiff can recover back from the defendant, the money paid on the said bills or either of them.

THE counsel for the plaintiff gave up the accepted bill, on the authority of *Jenys and Fawler*, Trin. 2 Geo. II. Strange 946. where it is held, that proof of forgery should not be admitted on behalf of the acceptor of a bill; because it would hurt the negotiation of paper credit; unless a difference could be allowed, as to the admission of evidence on a trial, and the determining the law after the fact is settled. As to the first bill, which was never accepted, they insisted the case was different. No credit had been given to that bill by an acceptance, therefore the same inconvenience would not follow.

By the court: This is an action for money had and received; the *Condictio Indebiti* in the Roman law: the most liberal species of actions on the case. If a man pays money *bona fide* due, after the statute of limitation has run upon it, or pays money fairly won at play; it will not lie, to recover it back. It will lie; if paid on a mistake, or without consideration, and the like. In the present case, no body knows the hand of the drawer, but the plaintiff. The first bill is taken up by him;—The second is accepted by him, before it comes to the defendant. The negligence in the plaintiff is greater, than can possibly be imputed to the defendant. Where the loss has fallen, there it must lie. One innocent man must not relieve himself by throwing it on another.—*Postea* delivered to the defendant, with judgment of nonsuit.

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2. For discounting bills and notes, the like attention is necessary to be had as was mentioned at the beginning of our third chapter, concerning such bills and notes as may be taken with safety in the course of trade; and as to taking more than 5l. *per cent.* In *Winch qui tam v. Fenn*, Sitt. after Hil. 1786, was an action for usury against the defendant, who was a country banker at Sudbury. It appeared on the trial, that the practice was to discount bills in London for various correspondents in Sudbury, and for which they had 5l. *per cent.* for the time the bills had to run, and they had also 5s. *per cent.* on the gross sum without any reference to the time, which the bills had to run. This commission had been taken by the defendant on the bills in question, and the jury found a verdict for the defendant under the judge's direction. Concerning which further mention will be made in C. IX. § IV. par. 12.

AND here we shall lay down tables for calculating interest at 5l. *per cent. per annum*, from one pound to five hundred, and from one day to thirty, also from one to twelve months.

	1 DAY.			2 DAYS.			3 DAYS.			4 DAYS.			5 DAYS.		
l.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.
1	0	0	0 0	0	0	0 0	0	0	0 0	0	0	0 0	0	0	0 0
2	0	0	0 0	0	0	0 0	0	0	0 0	0	0	0 0	0	0	0 0
3	0	0	0 0	0	0	0 0	0	0	0 1	0	0	0 1	0	0	0 1
4	0	0	0 0	0	0	0 1	0	0	0 1	0	0	0 2	0	0	0 2
5	0	0	0 0	0	0	0 1	0	0	0 1	0	0	0 2	0	0	0 3
6	0	0	0 0	0	0	0 1	0	0	0 2	0	0	0 3	0	0	0 3
7	0	0	0 0	0	0	0 1	0	0	0 2	0	0	0 3	0	0	1 0
8	0	0	0 1	0	0	0 2	0	0	0 3	0	0	1 0	0	0	1 1
9	0	0	0 1	0	0	0 2	0	0	0 3	0	0	1 0	0	0	1 1
10	0	0	0 1	0	0	0 2	0	0	0 3	0	0	1 1	0	0	1 2
20	0	0	0 2	0	0	1 1	0	0	1 3	0	0	2 2	0	0	3 1
30	0	0	0 3	0	0	1 3	0	0	2 3	0	0	3 3	0	0	4 3
40	0	0	1 1	0	0	2 2	0	0	3 3	0	0	5 1	0	0	6 2
50	0	0	1 2	0	0	3 1	0	0	4 3	0	0	6 2	0	0	8 0
60	0	0	1 3	0	0	3 3	0	0	5 3	0	0	7 3	0	0	9 3
70	0	0	2 1	0	0	4 2	0	0	6 3	0	0	9 0	0	0	11 2
80	0	0	2 2	0	0	5 1	0	0	7 3	0	0	10 2	0	1	1 0
90	0	0	2 3	0	0	5 3	0	0	8 3	0	0	11 3	0	1	2 3
100	0	0	3 1	0	0	6 2	0	0	9 3	0	1	1 0	0	1	4 1
200	0	0	6 2	0	1	1 0	0	1	7 2	0	2	2 1	0	2	8 3
300	0	0	9 3	0	1	7 2	0	2	5 2	0	3	3 1	0	4	1 1
400	0	1	1 0	0	2	2 1	0	3	3 1	0	4	4 2	0	5	5 3
500	0	1	4 1	0	2	8 3	0	4	1 1	0	5	5 3	0	6	10 0

6 DAYS.				7 DAYS.				8 DAYS.				9 DAYS.				10 DAYS.			
l.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.	l.	s.	d. f.	
1	0	0	0 0	0	0	0 0	0	0	0 1	0	0	0 1	0	0	0 1	0	0	0 1	
2	0	0	0 1	0	0	0 1	0	0	0 2	0	0	0 2	0	0	0 2	0	0	0 2	
3	0	0	0 2	0	0	0 2	0	0	0 3	0	0	0 3	0	0	0 3	0	0	0 3	
4	0	0	0 3	0	0	0 3	0	0	1 0	0	0	1 0	0	0	1 1	0	0	1 1	
5	0	0	0 3	0	0	1 0	0	0	1 1	0	0	1 1	0	0	1 2	0	0	1 2	
6	0	0	1 0	0	0	1 1	0	0	1 2	0	0	1 3	0	0	1 3	0	0	1 3	
7	0	0	1 1	0	0	1 2	0	0	1 3	0	0	2 0	0	0	2 1	0	0	2 1	
8	0	0	1 2	0	0	1 3	0	0	2 0	0	0	2 1	0	0	2 2	0	0	2 2	
9	0	0	1 3	0	0	2 0	0	0	2 1	0	0	2 2	0	0	2 3	0	0	2 3	
10	0	0	1 3	0	0	2 1	0	0	2 2	0	0	2 3	0	0	3 1	0	0	3 1	
20	0	0	3 3	0	0	4 2	0	0	5 1	0	0	5 3	0	0	6 2	0	0	6 2	
30	0	0	5 3	0	0	6 3	0	0	7 3	0	0	8 3	0	0	9 3	0	0	9 3	
40	0	0	7 3	0	0	9 0	0	0	10 2	0	0	11 3	0	1	1 0	0	1	1 0	
50	0	0	9 3	0	0	11 2	0	1	1 0	0	1	2 3	0	1	4 1	0	1	4 1	
60	0	0	11 3	0	1	1 3	0	1	3 3	0	1	5 3	0	1	7 2	0	1	7 2	
70	0	1	1 3	0	1	4 0	0	1	6 1	0	1	8 2	0	1	11 0	0	1	11 0	
80	0	1	3 3	0	1	6 1	0	1	9 0	0	1	11 2	0	2	2 1	0	2	2 1	
90	0	1	5 3	0	1	8 2	0	1	11 2	0	2	2 2	0	2	5 2	0	2	5 2	
100	0	1	7 2	0	1	11 0	0	2	2 1	0	2	5 2	0	2	8 3	0	2	8 3	
200	0	3	3 1	0	3	10 0	0	4	4 2	0	4	11 0	0	5	5 3	0	5	5 3	
300	0	4	11 0	0	5	9 0	0	6	6 3	0	7	4 3	0	8	2 2	0	8	2 2	
400	0	6	6 3	0	7	8 0	0	8	9 0	0	9	10 1	0	10	11 2	0	10	11 2	
500	0	8	2 2	0	9	7 0	0	10	11 2	0	12	3 3	0	13	8 1	0	13	8 1	

	11 DAYS.				12 DAYS.				13 DAYS.				14 DAYS.				15 DAYS.			
	l.	s.	d.	f.	l.	s.	d.	f.	l.	s.	d.	f.	l.	s.	d.	f.	l.	s.	d.	f.
1	0	0	0	1	0	0	0	1	0	0	0	1	0	0	0	1	0	0	0	1
2	0	0	0	2	0	0	0	3	0	0	0	3	0	0	0	3	0	0	0	3
3	0	0	1	0	0	0	1	0	0	0	1	1	0	0	1	1	0	0	1	1
4	0	0	1	1	0	0	1	2	0	0	1	2	0	0	1	3	0	0	1	3
5	0	0	1	3	0	0	1	3	0	0	2	0	0	0	2	1	0	0	2	1
6	0	0	2	0	0	0	2	1	0	0	2	2	0	0	2	3	0	0	2	3
7	0	0	2	2	0	0	2	3	0	0	2	3	0	0	3	0	0	0	3	1
8	0	0	2	3	0	0	3	0	0	0	3	1	0	0	3	2	0	0	3	3
9	0	0	3	1	0	0	3	2	0	0	3	3	0	0	4	0	0	0	4	1
10	0	0	3	2	0	0	3	3	0	0	4	1	0	0	4	2	0	0	4	3
20	0	0	7	0	0	0	7	3	0	0	8	2	0	0	9	0	0	0	9	3
30	0	0	10	3	0	0	11	3	0	1	10	3	0	1	11	3	0	1	12	3
40	0	1	2	1	0	1	3	3	0	1	5	0	0	1	6	1	0	1	7	2
50	0	1	6	0	0	1	7	2	0	1	9	1	0	1	11	0	0	2	0	2
60	0	1	9	2	0	1	11	2	0	2	12	0	2	3	2	0	2	5	2	
70	0	2	1	1	0	2	3	2	0	2	5	3	0	2	8	0	0	2	10	2
80	0	2	4	3	0	2	7	2	0	2	10	0	0	3	0	3	0	3	3	1
90	0	2	8	2	0	2	11	2	0	3	2	1	0	3	5	1	0	3	8	1
100	0	3	0	0	0	3	3	1	0	3	6	2	0	3	10	0	0	4	1	1
200	0	6	0	1	0	6	6	3	0	7	1	1	0	7	8	0	0	8	2	2
300	0	9	0	1	0	9	10	1	0	10	8	0	0	11	6	0	0	12	3	3
400	0	12	0	2	0	13	1	3	0	14	2	3	0	15	4	0	0	16	5	1
500	0	15	0	3	0	16	5	1	0	17	9	2	0	19	2	0	1	0	6	2

	16 DAYS.			17 DAYS.			18 DAYS.			19 DAYS.			20 DAYS.		
<i>l.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>
1	0	0	0 2	0	0	0 2	0	0	0 2	0	0	0 2	0	0	0 2
2	0	0	1 0	0	0	1 0	0	0	1 0	0	0	1 0	0	0	1 1
3	0	0	1 2	0	0	1 2	0	0	1 3	0	0	1 3	0	0	1 3
4	0	0	2 0	0	0	2 0	0	0	2 1	0	0	2 1	0	0	2 2
5	0	0	2 2	0	0	2 3	0	0	2 3	0	0	3 0	0	0	3 1
6	0	0	3 0	0	0	3 1	0	0	3 2	0	0	3 2	0	0	3 3
7	0	0	3 2	0	0	3 3	0	0	4 0	0	0	4 1	0	0	4 2
8	0	0	4 0	0	0	4 1	0	0	4 2	0	0	4 3	0	0	5 1
9	0	0	4 2	0	0	5 0	0	0	5 1	0	0	5 2	0	0	5 3
10	0	0	5 1	0	0	5 2	0	0	5 3	0	0	6 0	0	0	6 2
20	0	0	10 2	0	0	11 0	0	0	11 3	0	1	0 1	0	1	1 0
30	0	1	3 3	0	1	4 3	0	1	5 3	0	1	6 2	0	1	7 2
40	0	1	9 0	0	1	10 1	0	1	11 2	0	2	0 3	0	2	2 1
50	0	2	2 1	0	2	3 3	0	2	5 2	0	2	7 0	0	2	8 3
60	0	2	7 2	0	2	9 2	0	2	11 2	0	3	1 1	0	3	3 1
70	0	3	0 3	0	3	3 0	0	3	5 1	0	3	7 2	0	3	10 0
80	0	3	6 0	0	3	8 2	0	3	11 1	0	4	1 3	0	4	4 2
90	0	3	11 1	0	4	2 1	0	4	5 1	0	4	8 0	0	4	11 0
100	0	4	4 2	0	4	7 3	0	4	11 0	0	5	2 1	0	5	5 3
200	0	8	9 0	0	9	3 3	0	9	10 1	0	10	4 3	0	10	11 2
300	0	13	1 3	0	13	11 2	0	14	9 2	0	15	7 1	0	16	5 1
400	0	17	6 1	0	18	7 2	0	19	8 2	1	0	9 3	1	1	11 0
500	1	1	11 0	1	3	3 1	1	4	7 3	1	6	0 1	1	7	4 3

	21 DAYS.			22 DAYS.			23 DAYS.			24 DAYS.			25 DAYS.		
<i>l.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>
1	0	0	0 2	0	0	0 2	0	0	0 3	0	0	0 3	0	0	0 3
2	0	0	1 1	0	0	1 1	0	0	1 2	0	0	1 2	0	0	1 2
3	0	0	2 0	0	0	2 0	0	0	2 1	0	0	2 1	0	0	2 1
4	0	0	2 3	0	0	2 3	0	0	3 0	0	0	3 0	0	0	3 1
5	0	0	3 1	0	0	3 2	0	0	3 3	0	0	3 3	0	0	4 0
6	0	0	4 0	0	0	4 1	0	0	4 2	0	0	4 2	0	0	4 3
7	0	0	4 3	0	0	5 0	0	0	5 1	0	0	5 2	0	0	5 3
8	0	0	5 2	0	0	5 3	0	0	6 0	0	0	6 1	0	0	6 2
9	0	0	6 0	0	0	6 2	0	0	6 3	0	0	7 0	0	0	7 1
10	0	0	6 3	0	0	7 0	0	0	7 2	0	0	7 3	0	0	8 0
20	0	1	1 3	0	1	2 1	0	1	3 0	0	1	3 3	0	1	4 1
30	0	1	8 2	0	1	9 2	0	1	10 2	0	1	11 2	0	2	0 2
40	0	2	3 2	0	2	4 3	0	2	6 0	0	2	7 2	0	2	8 3
50	0	2	10 2	0	3	0 0	0	3	1 3	0	3	3 1	0	3	5 0
60	0	3	5 1	0	3	7 1	0	3	9 1	0	3	11 1	0	4	1 1
70	0	4	0 1	0	4	2 2	0	4	4 3	0	4	7 0	0	4	9 2
80	0	4	7 0	0	4	9 3	0	5	0 1	0	5	3 0	0	5	5 3
90	0	5	2 0	0	5	5 0	0	5	8 0	0	5	11 0	0	6	1 3
100	0	5	9 0	0	6	0 1	0	6	3 2	0	6	6 3	0	6	10 0
200	0	11	6 0	0	12	0 2	0	12	7 0	0	13	1 3	0	13	8 1
300	0	16	3 0	0	18	0 3	0	18	10 3	0	19	8 2	1	0	6 2
400	1	3	0 0	1	4	1 1	1	5	2 1	1	6	3 2	1	7	4 3
500	1	8	9 0	1	10	1 2	1	11	6 0	1	12	10 2	1	14	2 3

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	26 DAYS.			27 DAYS.			28 DAYS.			29 DAYS.			30 DAYS.		
	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>	<i>l.</i>	<i>s.</i>	<i>d. f.</i>
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2	0	0	1 2	0	0	1 3	0	0	1 3	0	0	1 3	0	0	1 3
3	0	0	2 2	0	0	2 2	0	0	2 3	0	0	2 3	0	0	2 3
4	0	0	3 1	0	0	3 2	0	0	3 2	0	0	3 3	0	0	3 3
5	0	0	4 1	0	0	4 1	0	0	4 2	0	0	4 3	0	0	4 3
6	0	0	5 0	0	0	5 1	0	0	5 2	0	0	5 2	0	0	5 3
7	0	0	5 3	0	0	6 0	0	0	6 1	0	0	6 2	0	0	6 3
8	0	0	6 3	0	0	7 0	0	0	7 1	0	0	7 2	0	0	7 3
9	0	0	7 2	0	0	7 3	0	0	8 1	0	0	8 2	0	0	8 3
10	0	0	8 2	0	0	8 3	0	0	9 0	0	0	9 2	0	0	9 3
20	0	1	5 0	0	1	5 3	0	1	6 1	0	1	7 0	0	1	7 2
30	0	2	1 2	0	2	2 2	0	2	3 2	0	2	4 2	0	2	5 2
40	0	2	10 0	0	2	11 2	0	3	0 3	0	3	2 0	0	3	3 1
50	0	3	6 2	0	3	8 1	0	3	10 0	0	3	11 2	0	4	1 1
60	0	4	3 1	0	4	5 1	0	4	7 0	0	4	9 0	0	4	11 0
70	0	4	11 3	0	5	2 0	0	5	4 1	0	5	6 2	0	5	9 0
80	0	5	8 1	0	5	11 0	0	6	1 2	0	6	4 1	0	6	6 3
90	0	6	4 3	0	6	7 3	0	6	10 3	0	7	1 3	0	7	4 3
100	0	7	1 1	0	7	4 3	0	7	8 0	0	7	11 1	0	8	2 2
200	0	14	2 3	0	14	9 2	0	15	4 0	0	15	10 2	0	16	5 1
300	1	1	4 1	1	2	2 1	1	3	0 0	1	3	10 0	1	4	7 3
400	1	8	5 3	1	9	7 0	1	10	8 0	1	11	9 1	1	12	10 2
500	1	15	7 1	1	16	11 3	1	18	4 1	1	19	8 2	2	1	1 0

	1 MONTH.				2 MONTHS.				3 MONTHS.				4 MONTHS.			
	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>
1	0	0	1	0	0	0	2	0	0	0	3	0	0	0	4	0
2	0	0	2	0	0	0	4	0	0	0	6	0	0	0	8	0
3	0	0	3	0	0	0	6	0	0	0	9	0	0	1	0	0
4	0	0	4	0	0	0	8	0	0	1	0	0	0	1	4	0
5	0	0	5	0	0	0	10	0	0	1	3	0	0	1	8	0
6	0	0	6	0	0	1	0	0	0	1	6	0	0	2	0	0
7	0	0	7	0	0	1	2	0	0	1	9	0	0	2	4	0
8	0	0	8	0	0	1	4	0	0	2	0	0	0	2	8	0
9	0	0	9	0	0	1	6	0	0	2	3	0	0	3	0	0
10	0	0	10	0	0	1	8	0	0	2	6	0	0	3	4	0
20	0	1	8	0	0	3	4	0	0	5	0	0	0	6	8	0
30	0	2	6	0	0	5	0	0	0	7	6	0	0	10	0	0
40	0	3	4	0	0	6	8	0	0	10	0	0	0	13	4	0
50	0	4	2	0	0	8	4	0	0	12	6	0	0	16	8	0
60	0	5	0	0	0	10	0	0	0	15	0	0	1	0	0	0
70	0	5	10	0	0	11	8	0	0	17	6	0	1	3	4	0
80	0	6	8	0	0	13	4	0	1	0	0	0	1	6	8	0
90	0	7	6	0	0	15	0	0	1	2	6	0	1	10	0	0
100	0	8	4	0	0	16	8	0	1	5	0	0	1	13	4	0
200	0	16	8	0	1	13	4	0	2	10	0	0	3	6	8	0
300	1	5	0	0	2	10	0	0	3	15	0	0	5	0	0	0
400	1	13	4	0	3	6	8	0	5	0	0	0	6	13	4	0
500	2	1	8	0	4	3	4	0	6	5	0	0	8	6	8	0

	5 MONTHS.				6 MONTHS.				7 MONTHS.				8 MONTHS.			
	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>
1	0	0	5	0	0	0	6	0	0	0	7	0	0	0	8	0
2	0	0	10	0	0	1	0	0	0	1	2	0	0	1	4	0
3	0	1	3	0	0	1	6	0	0	1	9	0	0	2	0	0
4	0	1	8	0	0	2	0	0	0	2	4	0	0	2	8	0
5	0	2	1	0	0	2	6	0	0	2	11	0	0	3	4	0
6	0	2	6	0	0	3	0	0	0	3	6	0	0	4	0	0
7	0	2	11	0	0	3	6	0	0	4	1	0	0	4	8	0
8	0	3	4	0	0	4	0	0	0	4	8	0	0	5	4	0
9	0	3	9	0	0	4	6	0	0	5	3	0	0	6	0	0
10	0	4	2	0	0	5	0	0	0	5	10	0	0	6	8	0
20	0	8	4	0	0	10	0	0	0	11	8	0	0	13	4	0
30	0	12	6	0	0	15	0	0	0	17	6	0	0	1	0	0
40	0	16	8	0	1	0	0	0	1	3	4	0	1	6	8	0
50	1	0	10	0	1	5	0	0	1	9	2	0	1	13	4	0
60	1	5	0	0	1	10	0	0	1	15	0	0	2	0	0	0
70	1	9	2	0	1	15	0	0	2	0	10	0	2	6	8	0
80	1	13	4	0	2	0	0	0	2	6	8	0	2	13	4	0
90	1	17	6	0	2	5	0	0	2	12	6	0	3	0	0	0
100	2	1	8	0	2	10	0	0	2	18	4	0	3	6	8	0
200	4	3	4	0	5	0	0	0	5	16	8	0	6	13	4	0
300	6	5	0	0	7	10	0	0	8	15	0	0	10	0	0	0
400	8	6	8	0	10	0	0	0	11	13	4	0	13	6	8	0
500	10	8	4	0	12	10	0	0	14	11	8	0	16	13	4	0

	9 MONTHS.				10 MONTHS.				11 MONTHS.				12 MONTHS.			
	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>f.</i>
1	0	0	9	0	0	0	10	0	0	0	11	0	0	1	0	0
2	0	1	6	0	0	1	8	0	0	1	10	0	0	2	0	0
3	0	2	3	0	0	2	6	0	0	2	9	0	0	3	0	0
4	0	3	0	0	0	3	4	0	0	3	8	0	0	4	0	0
5	0	3	9	0	0	4	2	0	0	4	7	0	0	5	0	0
6	0	4	6	0	0	5	0	0	0	5	6	0	0	6	0	0
7	0	5	3	0	0	5	10	0	0	6	5	0	0	7	0	0
8	0	6	0	0	0	6	8	0	0	7	4	0	0	8	0	0
9	0	6	9	0	0	7	6	0	0	8	3	0	0	9	0	0
10	0	7	6	0	0	8	4	0	0	9	2	0	0	10	0	0
20	0	15	0	0	0	16	8	0	0	18	4	0	1	0	0	0
30	1	2	6	0	1	5	0	0	1	7	6	0	1	10	0	0
40	1	10	0	0	1	13	4	0	1	16	8	0	2	0	0	0
50	1	17	6	0	2	1	8	0	2	5	10	0	2	10	0	0
60	2	5	0	0	2	10	0	0	2	15	0	0	3	0	0	0
70	2	12	6	0	2	18	4	0	3	4	2	0	3	10	0	0
80	3	0	0	0	3	6	8	0	3	13	4	0	4	0	0	0
90	3	7	6	0	3	15	0	0	4	2	6	0	4	10	0	0
100	3	15	0	0	4	3	4	0	4	11	8	0	5	0	0	0
200	7	10	0	0	8	6	8	0	9	3	4	0	10	0	0	0
300	11	5	0	0	12	10	0	0	13	15	0	0	15	0	0	0
400	15	0	0	0	16	13	4	0	18	6	8	0	20	0	0	0
500	18	15	0	0	20	16	8	0	22	18	4	0	25	0	0	0

CHAPTER VIII.

Of making Demand of Payment or Acceptance, and giving Notice of Non-payment, or Non-acceptance.

AS when payment of a bill or note is demanded the same must be presented, we shall here in our first section attend to making the presentment. In § II. treat on whom demand of payment must be made previous to suing on a bill or note. In § III. on the notice to be given. In § IV. on holding bills and notes after being dishonoured, and the time in which notice should be given thereof. In § V. shew when it is not necessary for notice to be given the drawer, and the reason why notice of a bill being dishonoured is requisite. And in § VI. treat on presenting a bill for acceptance and giving notice of non-acceptance, and conclude the chapter with a few hints by way of reminding the reader concerning the protest.

§ I. AS to the time when, and place where a bill or note must be presented, the former having been heretofore treated on in different chapters, we need here only mention that the time when presentment for payment must be made, depends upon the time when a bill or note is payable; if made payable on sight or demand, no days of grace are allowed; otherwise if payable after sight or date; as shewn in C. III. § I. par. 3. On the day the bill or note becomes due it must be presented for payment, and no delay should be in presenting drafts on bankers made payable on demand; as shewn in C. III. § III. par. 1, 2. And as to bills and notes whereon the three days grace are allowed, when the last of the three days happen on a Sunday or great holiday the bill or note should be presented on the second day, as we have mentioned concerning foreign bills in C. V. § II. par. 1. as that it is usual throughout London to present all bills whether foreign or inland on the second day, when the last of the three days happen on a Sunday or great holiday.—As to the exact period in which presentment for acceptance must be made, this does not appear in any case to have been ascertained; and whether it is requisite that a bill payable after date be presented for acceptance, does not appear to be determined by any judicial determination, as heretofore mentioned in C. II. § IV. par. 4. and hereafter in § VI.

THE presentment of a bill or note must be at the place where the same is payable; but if no place be mentioned for the purpose

pose the bill or note is payable at the drawee's or maker's place of residence. If the place of residence be mentioned in the bill, and it appears upon a proper inquiry, that the drawee or maker either never lived there or has removed to an unreasonable distance or an unknown place, the bill or note is to be considered as dishonoured^a.—Upon removal of the drawee or maker, the holder is bound to endeavour to find out to what place he has removed and make the presentment there^b.—Where the drawee after acceptance dies demand must be made of his executors or administrators if such are appointed, as shewn in C. v. § III. par. 1. And that demand of payment should be made although the party is become bankrupt will be seen hereafter in § v. par. 1. and hence we shall proceed to show on whom it is necessary to make the demand; and that it is now fully settled, that in an action against the indorser of a bill, the plaintiff need not prove any application to the drawer for payment, though it has been held otherwise.

§ II. THAT demand of payment on the drawer by indorsee, is not necessary previous to suing acceptor of a bill; but must be made on the acceptor previous to suing the drawer or indorser, and on maker of a promissory note previous to suing the indorser, is fully settled in the case of *Heylins and others v. Adamson*, King's Bench, Mich. 32 Geo. II. In this case, an action was brought against the defendant as indorser of an inland bill of exchange for 100l. drawn at forty days sight, by one Carrick upon one Dodd, in favour of the defendant, who indorsed it to the plaintiffs. Dodd accepted the bill, but did not pay it, upon which it was protested by the plaintiffs. All which was proved to the jury; but it did not appear that the drawer had notice of the non-payment, before this action was brought, or that any application was first made to him for payment: And this matter being objected by the defendant's counsel, and they insisting that for want of such notice or demand, or due diligence used for that purpose, the plaintiffs must be non-suited, the jury gave a verdict for the plaintiffs in 100l. damages and 40s. costs, subject to the opinion of the court. And as this was a point unsettled, and many contradictory opinions thereon, the court took time to consider of it; and this term were unanimously of opinion that, in the present case, it was not necessary to demand the money from the drawer, or to use any diligence for that purpose, or to give him notice of non-payment by the drawee. That a bill of exchange was an order or command given by the drawer on or to the drawee (who has, or is supposed to have, effects of the drawer in his hands) to pay a sum of

^a Id. Raym. 743.

^b Str. 1087.

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of money to a third person ; that when the bill is accepted, the drawee is become the principal debtor, and the drawer is liable only in default of the drawee, and if due diligence be not used to get the money from the acceptor or drawee, and notice of his non-payment given in convenient time to the drawer, the drawer should not be liable ; for if it should be otherwise, and the person upon whom the bill was drawn should become insolvent without such due diligence used by the payee, or person to whom the bill is payable, to demand payment from the drawee, or without his giving the drawer timely notice of the non-payment, then would the drawer unreasonably suffer through the *laches* of the payee ; having no intimation to call in his effects before the drawee became insolvent.

THAT when a bill of exchange is indorsed by the person to whom it is made payable, it is become a new bill, and the indorser is in the place of the drawer ; and therefore if the indorsee uses due diligence to get the money from the acceptor, and is refused payment, then the indorser, who has put himself in the place of the original drawer, upon notice of such non-payment, is become liable immediately, but not otherwise ; in like manner, and for the same reason that the original drawer would have been, in the like case, had there been no indorsement : And the indorsee is not obliged to make any demand upon the drawer, or to give him any notice ; for he does not trust the drawer (who may not, perhaps be known to him). The indorser is his debtor, and not barely a warrantor or security for the payment of the money.

THAT there was no difference between foreign and inland bills of exchange, except in the degree of the conveniency ; and as to foreign bills, this matter has been determined before in *Strange 441*. The reason of the judgment there given was for the inconveniences that would ensue to commerce in general, from the discredit it would bring upon bills of exchange to be thus clogged with a necessity of giving such notice, and making a demand on the original drawer. Now every inconvenience attending a foreign bill holds to a great degree, though not equally in respect to an inland bill, if a person should be obliged, perhaps, in several remote parts of the kingdom, to enquire after and find out the drawer ; and therefore in this case it was not necessary to prove any enquiry after, or demand upon the original drawer, or any notice of the non-payment to him.

THAT what give rise to the seeming contrariety of opinions upon this point, is the confused manner in which cases upon inland bills of exchange and promissory notes, are reported and blended together. There is a strong resemblance between a promissory note indorsed, and an inland bill of exchange, and the

the law should be settled on the analogy between them.— Whilst a promissory note remains in its original state without indorsement, it bears no resemblance to an inland bill of exchange; but when it is indorsed to a third person the similitude begins; for then the maker of the note is in the same situation with the drawee or acceptor of the bill of exchange; and the indorsee of either bill or note must demand the money from the acceptor of the bill, or maker of the note, before an action can be brought against the indorser; that this was determined with respect to the maker of a note, in the court of Common Pleas, as cited in *Strange*, 1087; that where *Holt* said in *Oake's case* reported in lord Raymond, 443, *that the indorsee must demand or endeavour to demand the money from the maker of the note; before he can sue the indorser*; and added further, “The same law “ if the bill was drawn upon any other person payable to O. or Order.” He does not mean that the demand must be first made on the drawer of the bill of exchange, before the indorsee can sue the indorser, but upon the person who is in the same situation with the drawer (or maker) of the promissory note, who is the real debtor, and this is the acceptor of the bill of exchange.

THAT this opinion of Holt, which thus construed, agreed with the present opinion of the court, was misunderstood and confused in *Salkeld*, 127, (which is manifestly a wrong collection from Holt's opinion in *Oake's case*) where it is said that the indorsee of a bill of exchange must, in an action against the indorser, prove, “that he demanded the money from the drawer, or him upon whom it is drawn, and that he refused to pay it, or else that he sought him and could not find him;” that there was the same mistake in 12 Mod. 244; and that the confused and short notes taken of these and other cases, were the true occasion of all the contrariety of opinions to this point.

AND that upon the whole, in an action by the indorsee of an inland bill of exchange against the indorser, he must prove a demand, or due diligence used to make it, upon the acceptor, or person upon whom the bill was drawn: And in an action by the indorsee of a promissory note against the indorser, he must prove a demand made, or due diligence used to make it, from the maker of the note.

§ III. AS concerning notice. If payment be refused, or the drawee of the bill or maker of the note, has become insolvent, or hath absconded, notice thereof must be given to the preceding party, viz. the drawer, or if the bill be indorsed, to the indorser, and should be in such time as treated

on in the ensuing section; and in an action the same must be proved to have been given, as in *Dagglish v. Weatherby*, Hil. 2 Geo. III. Weatherby drew three bills of exchange on Morley, payable to Dagglish. Two were tendered for payment, and refused. No account was given of the third.—Dagglish brought his action against the drawer, for the value: But, not proving any notice given to the drawer of non-payment, or that the drawee was insolvent, or had absconded, chief justice De Grey, at *Nisi Prius*, nonsuited the plaintiff^d.—Demand of payment should be made and notice given, although the party is become bankrupt or insolvent; yet notice to the drawer is not necessary, either of non-acceptance or non-payment, if it can be proved that drawee had no effects of his in hand, as shewn hereafter in § v. par. 2. with the reason why it is requisite; and in § vi. that the case is different with respect to an indorser, who must have notice from the indorsee of the bill being dishonoured.

§ IV. AS with respect to holding bills and notes after being dishonoured, and the time in which notice should be given to the drawer or indorser, there hath been much litigation; we shall here proceed with the case of *Tindal v. Brown*, Easter, 26 Geo. III^e. from whence may be perceived what is now held to be reasonable notice of non-payment by the maker of a promissory note, or acceptor of a bill of exchange.

IN this case it was held, that where all the parties to a promissory note lived within twenty minutes walk of each other, indorser was discharged by the negligence of the holder, notwithstanding he had notice from the *drawer* on the day after the note became due, that he could not pay it. That this notice being from the drawer and not from the holder of the bill, was insufficient, as the same should have been from the holder, and thereby shewing his intention not to give credit; and if it had so been, the next day at the most is as long as is necessary for giving the notice in a case circumstanced like this. If the parties live at a small distance this is sufficient time; if at a greater they should write by the next post.

THE report of the case is as follows: The plaintiffs were indorsees of a promissory note indorsed by Brown. The cause first came on to be tried at the sittings after Easter Term 1785, before lord Mansfield at Guildhall, when the jury found a verdict for the plaintiffs.—On a motion for a new trial in last Trinity term, the facts appeared to be these, that on the 21st of August, 1784, the note in question was made by one Donaldson for 35l. payable six weeks after date; that on the 5th October,

^d 2 Black. Rep. 747.

^e 1 Durnf. & East, Rep. 167.

tober, 1784, the day on which the note became due, allowing for the three days grace, one Howell (the plaintiffs clerk) called on Donaldson at ten in the morning, and not finding him at home, he left word that the note was due, and desired Donaldson would send for it at his master's, where it lay, and take it up; that on the next day, Wednesday the 6th of October, he called again on Donaldson, who told him he would take it up that day within the banking hours, which were from nine to four o'clock; that the note not being taken up that day, he called again on Donaldson on Thursday the 7th, and not finding him at home, he was sent to the defendant Brown, to tender the note, who refused to pay it, saying the plaintiffs had made it their own. Donaldson proved at the trial, that immediately on his parting with Howell, on Wednesday the 6th, he went to Brown's house, and not finding him at home, he left a message with his wife, that the note was due, that he (Donaldson) could not pay it, and desired that Brown would take it up, adding that he would make it good to him.—That all the parties lived at Bristol, within twenty minutes walk of each other.

AFTER argument by Lee and Morgan for the plaintiffs, and Cowper and Baldwin for the defendant, the court delivered their opinions to the following effect.

LORD MANSFIELD. On full consideration, I am now decidedly of opinion that there ought to be a new trial. It is of great consequence that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear, that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the post, &c. But, wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty. I cannot form to myself an idea of the ground on which the jury went in giving this verdict. Did they conceive the rule to be that the holder might delay giving notice for two days, or what other time did they mean to allow him? Here an earlier notice might certainly have been given, as all the parties lived within twenty minutes walk of each other. The bill was dishonoured on the fifth, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day; and the plaintiffs did not go at four that afternoon, but waited till the next day. It has been held, that where the party liable does not live in the same place, the holder must write by the next post after the bill

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bill is dishonoured. It was well observed by the counsel, that the juries were obstinate in the case of *Metcalf* and *Hall*, [in C. III § III. par. 2.n.] where they struggled so hard, in spite of the opinion of the court, to narrow the rule, that they held you must in certain cases demand payment on a banker's draft within an hour. Here the struggle is to give a greater latitude than is necessary. It was once doubted whether notice within fourteen days was not sufficient. For the sake of diligence and certainty, I am of opinion there should be a new trial.

JUSTICE WILLES. I agree that there ought to be a new trial. New credit was given to the maker on the 7th; the plaintiff's clerk went first to Donaldson to demand the bill of him, and after that they sent it to the defendant. As to the notice, I cannot consider the notice given by the maker equal to that given by the holder. The plaintiffs have not acted with legal diligence.

JUSTICE ASHHURST. It is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty. The next day at the most is as long as is necessary in a case circumstanced like this. If the parties live at a small distance, this is sufficient time; if at a greater, they should write by the next post. Notice means something more than knowledge: because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that *he* (the holder) *does not intend to give credit*. In the present case there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.

JUSTICE BULLER. The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world; and this evil can only be remedied by doing what the court wished to do in the case of *Metcalf* and *Hall*; by considering the reasonableness of time as a question of law, and not of fact. Whether the post goes out this or that day, at what time, &c. are matters of fact; but when those facts are established, it then becomes a question of law on those facts, what notice shall be reasonable.

As to giving time; the holder does it at his peril. And that circumstance alone would be sufficient to decide this case. For in no case has it been determined, that the indorser is liable after the holder of the note has given time to the maker.

WITH respect to notice, I concur in the opinion which has been given by the court, and particularly for the reason given

given by my brother Ashhurst. The purpose of giving notice is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as in the present case, the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged; because it would have amounted only to this, "the note made by Donaldson, and indorsed by you, is not paid, and I have given credit to Donaldson till to-morrow." Though there is no prescribed form of this kind of notice, yet it must import that the holder looks on the indorser as liable, and expects payment from him, that he may have his remedy over by an early application. Then it becomes his business to take up the note. But notice of having given credit to the maker will discharge the indorser. The notice by another person to the indorser can never be sufficient; but it must proceed from the holder himself.

THE rule for a new trial being made absolute.—This cause was heard a second time before justice Buller at the sittings at Guildhall after last Hilary term, when in addition to the evidence given on the former trial, one Weeks, the defendant's attorney, was called, who swore, that in a conversation which he held with Donaldson, on Thursday the 7th of October, concerning the note in question, Donaldson told him he was that moment come from Brown's, where he had left a message with Mrs. Brown, desiring her husband to take up the note; that the reason why he was so exact as to the particular day, and the expression made use of by Donaldson, was because he kept a minute of all his transactions; that his minute was confirmed in this respect by his memory; and besides that, at a meeting between the parties before the action was brought, this fact was admitted on both sides.—This jury, which was a special one, likewise found for the plaintiffs.

COWPER having moved this term for a new trial, on the ground that this was a verdict against law; Erskine, for the plaintiffs, shewed cause, and admitted that it was not now to be disputed that what should be considered to be a reasonable time, was a question of law; but contended, that in this case the plaintiffs had used due diligence, and had given the defendant notice within a reasonable time. That Donaldson ought to be considered as the agent of the plaintiffs for the purpose of giving notice to the defendant. That there was a contradiction as to the time when this notice was first given to the defendant, whether on the 6th or 7th of October, which con-

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tradiction arose from the testimony of Weeks, who was not produced at the former trial, which circumstance might have afforded the jury some room for suspicion; but this was a point proper for the determination of the jury, who had decided it. That, at all events, the court should be extremely cautious in granting a third trial; particularly as the sum in litigation was so small. That in *Metcalf and Hall*, which involved a similar question, the court had refused to grant a third trial.

THE counsel on the other side were stopped by the court, who referred to their former decision, and added, that even if the application had been made to the defendant on the 6th, it would have been too late because the plaintiffs had given credit to the drawer. That though it was true in general, that the court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply where a verdict had been given against law. That the reason why the court refused granting a third trial in the case of *Metcalf and Hall*, was because the plaintiff had proved his debt under a commission of bankrupt, which had issued against the drawees of the bill between the time of the verdict and the motion for a new trial.—Rule absolute.

IF the holder of a bill of exchange give time to the acceptor upon condition that he should allow interest, and he afterwards pays the bill, having committed a secret act of bankruptcy; this not being a payment in the usual course of trade, the assignees of the bankrupt may recover the money back again^f.

§ V. 1. ALTHOUGH a party become bankrupt, demand of payment should be made and notice given of a bill being dishonoured. In the case of *Bickerdike v. Bollman*, in King's Bench, Mich. 27 Geo. III. the counsel observed in the argument, that it was said by Lee, in arguing the case of *Ruffel and Langstaffe* [in C. VI. § IV.] and not denied by the court, that it had been frequently ruled by lord Mansfield at Guildhall, that it is not an excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor is become a bankrupt, as many ways may remain of obtaining payment by the assistance of friends or otherwise^g.

2. BUT notice to the drawer is not necessary if it can be proved that the drawee had no effects of his in hand.—By justice Ashhurst in delivering his opinion in the above mentioned case of *Bickerdike v. Bollman*: As to the general rule; it has never been disputed that the want of notice to the drawer after the dishonour of a bill is tantamount to payment by

^f Trader's and Conveyancer's Guide and Guard, Chap. 1.

^g † Durnf. and East, Rep. 408. See

more concerning notice where a party is become a bankrupt, hereafter in C.

IX. § V. par. 2.

by him ; but that rule is not without exceptions. Notice is not necessary to be given where the drawer has no effects in the hands of the drawee : for it is a fraud in itself, and if that can be proved, the notice may be dispensed with. And by justice Buller in delivering his opinion in this case : One point to be considered is, whether under certain circumstances it was necessary to give notice within as short a time as could conveniently be done, that a bill was neither accepted nor paid. On the second trial of the cause of *Tindal and Brown* [in the preceding section], before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that, it had not appeared from the evidence that any injury had arisen to the party for want of notice. In consequence of which, upon the subsequent trial, I told the jury that, where a bill was accepted, it was *prima facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the court, they thought that if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt. The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands ; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I sat on this bench I tried a cause at Guildhall, on a bill of exchange which was either drawn or accepted by a person residing in Holland, and a full special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonoured, because he had no effects in the hands of the person on whom the bill was drawn. That verdict never was objected to ; and if it be proved on the part of the plaintiff that, from the time the bill was drawn till the time it became due the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary ; for he must know whether he had effects in the hands of the drawee or not ; and if he had none, he had no right to draw upon him, and to expect payment from him ; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured^h.

3. THE objection arising from want of notice of non-acceptance

^h 1 Durnf. and East Rep. 405.

ance of a bill of exchange from the holder to the drawer, is done away by shewing that the latter had no effects in the hands of the drawee at the time. Yet it is a query how far this rule holds if the drawer shew from other circumstances that, in fact he sustained an injury for want of such notice? But at any rate if on demand made he answer that the bill must be paid, he shall be liable; this being an admission that he had no effects in the hands of the drawee, and that he sustained no damage for want of notice that the bill had not been paid¹.

THAT the case is different when the action is against an indorser, and that no proof will be admitted to shew that there were no effects in the hands of the acceptor, is demonstrated in par. 2. in the following section.

§ VI. 1. AS concerning presenting a bill for acceptance. Whether it is requisite that a bill payable after date be presented for acceptance does not appear to be determined by any judicial determination, as was heretofore mentioned in § I. And that indorsee need not present it, but if he does and acceptance be refused, and he delay giving notice to his indorser, the indorser will be discharged, although a subsequent promise be made by him to pay the bill, was determined in *Bleford v. Hirsh and another*, King's Bench, Mich. 11 Geo. III. and in *Goodall and others v. Dolley*, Easter, 27 Geo. III. In the former of those cases was an action brought against the defendants, who are partners in trade, as indorsers of a bill of exchange. The defendants pleaded the general issue. And on the trial it appeared in evidence, that William Topham of Leeds, in the county of York, on the 8th day of March, 1769, drew a bill of exchange on Messrs. Klotz in London, bearing date the same day for 30l. payable six weeks after date to the defendants or order for value received; who indorsed it to the plaintiff. On the 18th of March, the plaintiff, who resides at Bradford in Yorkshire, sent the bill to Lewis and Martin his correspondents in London; who received it on the 21st of March, and on that day or the next day after presented it to Messrs. Klotz on whom it was drawn, for acceptance, who refused to accept it. On the 22d of April, which was the day on which the bill became due, it was presented by Lewis and Martin, and protested for non-payment. That Topham the drawer, continued in credit till the 11th of April; soon after which, a commission of bankrupt issued against him.—That no notice was given of the refusal to accept the bill: but on the 29th of April the plaintiff gave notice to the defendants that Messrs.

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¹ *Rogers v. Stephens*, Mich. 29 Geo. III. 2 Durnf. and East. Rep. 713.

Klotz had refused to pay the bill; and that it was returned with charges of protest. On the 2d of May one of the defendants called at the plaintiff's, in his way from his own house to Leeds; and told the plaintiff he would take up the bill as he came back:—but on his return he said, he had been advised that he was not bound to do it.—Plaintiff had a verdict for 30*l.* subject to the opinion of the court upon the question, “Whether under the circumstances of this case the plaintiff is intitled to recover.”

AND this being brought before the court, the fact as stated by the counsel was, that an inland bill of exchange was drawn by Topham upon Messrs. Klotz; and was indorsed by defendants to the plaintiff, who presented it for acceptance: It was refused to be accepted. The plaintiff kept it in his hands three weeks, without giving notice to the person from whom he received it, “that it had been refused to be accepted.” Topham remained in good credit during these three weeks; and then failed before the time of payment came.—The question was, “Whether the plaintiff, the holder of the bill, could recover of the person from whom he received it; when he had thus neglected to give him notice of the refusal to accept it?”—After the counsel had closed their arguments,

LORD MANSFIELD, chief justice, observed that, this is a matter of great consequence to trade and commerce; especially, in this country and at this time. This is an inland bill made payable to one man, and indorsed by him to a third man. This third man tenders it for acceptance; and it is refused. He keeps it three weeks without giving any notice of such refusal to accept. He ought to have given notice of this refusal, and not to have concealed it; and by not giving notice, has taken the risk upon himself. The indorser of the bill is imposed upon. The person who neglected to give the notice ought to suffer for it.—The question is not, “whether he was obliged to present it for acceptance.” He *has* done so; and it was refused.—There is no difference between an inland bill and a foreign one, in this case. They are both now upon the same foot: *Heylin and others v. Adamson* in this court [at large in § 11.].

MR. justice Willes and Mr. justice Ashurst, concurred in opinion with his lordship. They held that the holder of the bill ought to suffer for having neglected to give notice to the person from whom he received it, of the drawee's refusal to accept it. And Mr. justice Ashurst added that it was understood (upon inquiry) to be the practice of merchants, as well as agreeable to the reason of the thing, that notice should be given.—Hereon it was ordered that the *Poslea* be delivered to the defendants^k.

^k 5 Burr. Rep. 1670.

2. IN the before mentioned case of *Goodall and others v. Dolley*, was an action by the indorsee of a bill of exchange against the indorser, tried before Mr. justice Heath, at the then last assizes at Warwick. The bill which was dated on the 4th of November 1786, was drawn by one Lutwych on John Rutter, in favour of the defendant, and payable sixty-five days after date. The defendant indorsed it to the plaintiffs. The bill was tendered for acceptance by the plaintiffs to Rutter on the 8th of November, who refused to accept it. The first advice given of this refusal by the plaintiffs to the defendant was by a letter dated the 6th of January following, which only mentioned generally the return of the bill, without specifying the time or circumstance of the tender of the bill to Rutter, and his refusal. The bill expired on the 11th of January; and on the next day, the defendant made a proposal to one of the plaintiffs to pay the bill by instalments. Justice Heath was of opinion, that as this proposal was made under an ignorance of all the circumstances of the case, which it was material for the defendant to know, he was discharged by the *laches* [negligence] of the plaintiffs; and, in consequence of the direction, the jury found a verdict for the defendant.

A MOTION was made by Lee, plaintiff's counsel, for a new trial on two grounds. First, that as notice in this case could not have been of any service to the defendant, in as much as Rutter was insolvent when the bill was refused acceptance, it was not necessary to give notice before the bill became due, and the indorser still continued liable. Secondly, supposing he might once have taken advantage of the plaintiffs' *laches*, yet he had waived that advantage by his subsequent promise.

BALGUY, counsel for the defendant, shewed cause why a new trial should not be granted; and argued that as to the first point it is perfectly clear that the plaintiffs, if they meant to resort to the defendant, should have given immediate notice to him of the bill's being dishonoured; instead of which they suffered a long space of time to elapse, by which neglect they have discharged the defendant. As to the other point; the defendant cannot be said to have made himself liable by his subsequent conduct; for if that were so, the same reasoning would have governed the case of *Blesard and Hirst* [the preceding case], where there was an absolute promise to pay. That therefore was much stronger than the present; for here the party did not absolutely say that he would pay the bill; but under an ignorance of all the circumstances, he proposed to pay it by instalments. This then at most was only a conditional offer, and not being accepted, was the same as if it never had been made.

THE counsel for plaintiffs offered to procure an affidavit, that

that the drawee had no effects of the drawer in his hands at the time. But as to this, the court were of opinion, that, as between these parties, that would make no difference; and now delivered their separate opinions.

JUSTICE ASHHURST: The case of *Blesard v. Hirst* goes the whole length of deciding the present. It was there determined, that though it was not necessary that the holder should present the bill for acceptance before it became due, yet if he does, he must give immediate notice to the person from whom he received the bill in case it is dishonored. Here such notice was not given, and therefore the defendant was discharged. But then it is said that he made himself subsequently liable by his proposal to pay the bill by instalments, which amounted to an acknowledgment of the debt. That argument might as well have been urged in the case of *Blesard v. Hirst* as the present, if it had been thought material. For there the indorser absolutely promised to pay the bill on his return from Leeds; but, on his being apprized that he was not bound by law, he refused. And yet, that was not held as a waiver of the want of notice. That indeed was a stronger case than the present; for here the defendant only made a conditional offer to pay by instalments, which, being rejected, put matters in the same situation as if no offer had been made. The defendant then had a right to stand on the strict rule of law; and by law he is not bound to pay.

JUSTICE BULLER: It is rather extraordinary that in the case of *Blesard v. Hirst*, it should have been made a doubt whether notice of non-acceptance, in the case of an inland bill of exchange, was necessary to be given to the drawer. For it had long been settled, that notice was necessary to be given in the case of foreign bills. But no mention is there made of the want of notice being waived by a subsequent promise. And that was a much stronger case than the present; for there, there was an express promise to pay by the indorser: but in this case there was only a conditional promise, which was made by the defendant under a total ignorance of all the circumstances relative to the bill having been dishonored. All this is an answer to an action against the indorser. But if the action had been brought against the drawer, I should have been willing to let in the affidavit to shew that the drawer had no effects in the hands of the drawee. That would be like the case of *Bickerdike v. Bellman* [in the preceding section]. If A. draw on B. it must be taken *prima facie* that he has effects in his hands; otherwise he has no right to draw on him. But if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice that the drawee will not pay.

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JUSTICE GROSE: If there be any difference between the case of *Bleard v. Hirsh* and the present, it is in favor of this defendant. For at the most, this was only a conditional offer to pay, but that was a positive promise by the defendant to take up the bill as he returned from Leeds. That case therefore, being precisely in point, must govern the present.—Rule discharged¹.

THUS having proceeded on making demand and giving notice of a bill or note being dishonoured, we may now advert to the subjects of our fifth chapter concerning the protest, by way of reminding the reader that this is requisite for all foreign bills, whether for non-acceptance or non-payment^m; and where an inland bill payable after date, and expressing value received, is for the payment of twenty pounds or upwards, a neglect to procure it, precludes the holder from recovering interest and expences against the person entitled to notice of a bill being dishonoured. And as to the time wherein notice must be given, it appears in the preceding page that, it must be immediately after acceptance is refused, and from the relation in our fourth section that, where the parties reside in the same place in which presentment was made, the farthest time allowed for giving notice is the expiration of the day following on which the bill was dishonoured; and that where the parties reside at a distance notice must be given by the next post. And now we may conclude by observing that, a notice from the holder enures to the benefit of all the antecedent parties; yet it is advisable for each party immediately upon the receipt of notice, to give fresh notice to such as are answerable to him on account of non-acceptance or non-payment, against whom (if an action be brought) he must prove notice.

¹ 1 Durnf. and East, Rep. 712.

^m Sec C. V. § 11.

CHAPTER IX.

Of suing the Parties. Proof required by Plaintiff in prosecuting his Suit. Defence Defendant may set up to the Plaintiff's Action. The Writ of Inquiry.—Satisfaction that may be had by suing on a Bill or Note. By proving under a Commission of Bankruptcy. Bank Notes. Persons privileged from Arrest.

THAT the holder of a bill or note may sue all or any of the parties till satisfaction is had, will hereafter be demonstrated in § iv. where we shall treat concerning to whom the money is to be paid by the acceptor, and on the satisfaction that may be had by suing. And as in C. X. § i. par. 1. we have treated on the mode of commencing and proceeding in personal actions, and there shewn what is the usual action brought on a bill of exchange or promissory note, with the method of declaring therein; we shall here advert to what is there touched upon, and in our first section progressively enlarge upon the hints given concerning the declaration, and endeavour to shew what should be stated therein when an action is brought on a bill or note, and lay down some of the usual forms thereof; as, where the action is by the payee against the maker of a note. By indorsee against indorser of a note. By drawers partners against acceptor of an inland bill payable to them or their order. By indorsee against acceptor of an inland bill. By drawer against acceptor of a foreign bill protested. By second indorsee against first indorser of a foreign bill. In § ii. treat on the proof required by the plaintiff in prosecuting his suit. In § iii. on the defence defendant may set up to the plaintiff's action. The writ of inquiry. In § iv. shew, as above hinted, that holder may sue all or any of the parties till satisfaction

satisfaction is had, and what may be had by suing. In § v. treat on the satisfaction that may be had by proving under a commission of bankruptcy. In § vi. on the nature and effects of bank notes. And in § vii. on the privilege of attornies, and on persons privileged from arrest.

§ 1. OF the declaration, and stating the plaintiff's complaint in an action on a bill or note. 1. The declaration, antiently called the *tale*, requires more nicety in framing than is generally supposed, and however simple the relating this tale by writing, as it is now always required to be, may seem to many; yet for this purpose a competent knowledge of the law is requisite, a deficiency therein by persons who have undertaken to draw the declaration or relate this tale, having often proved of no small loss to the plaintiff; the tale being so imperfectly related as to leave room for the defendant's availing himself of the imperfection by a demurrer thereto; and hereby the plaintiff has frequently not only been delayed in his suit, but had considerable cost to pay before any progress made therein; in so much that, it has sometimes happened that notwithstanding the clearness of his case, and even a certainty of obtaining a verdict, had the cause been well managed, he has been so intimidated with the delay, and payment of perhaps 10 or 15l. cost, as to occasion his compromising to his great injury with the defendant, rather than persist in prosecuting the suit or beginning it again, after being foiled at his first set out. It is true inaccuracies in the pleadings are greatly helped by the statutes 16 & 17 Car. II. c. 8. and 4 & 5. Ann. c. 16. and by those statutes divers mistakes and omissions in the former part of a suit are provided against; but notwithstanding these provisions, great loss often happens to parties in a suit through the inadvertency of practitioners and their inability of framing the declarations and other parts of the pleadings; for which a sufficient knowledge of the law is requisite, as will be further demonstrated hereafter, in our remarks at the end of the forms in par. 3. 4.—Those pleadings are varied according to the different actions, which in C. X. § 1. are briefly defined, and are treated on in a great variety of books wrote by eminent lawyers; though the science of pleading is little known, or even the meaning thereof understood by few besides gentlemen who are of the profession; which induces us to drop those hints concerning it, by which may be perceived a difference between this and pleading by counsel at the bar, which latter, although commonly called pleading, is properly

properly styled argument, and is verbally performed, but the former as abovementioned must be in writing; of which further mention will be made hereafter in C. X. § 1. par. 2.

AND hence we shall proceed to lay down some general maxims necessary to be attended to in drawing the declaration, in an action brought on a bill of exchange or promissory note. FORMERLY in declaring on a bill of exchange the custom of merchants was usually recited at full length, but the custom being part of the common law of which the judges take notice *ex officio*^b, it has long since been held unnecessary to set forth the custom specially in the declaration, and that it is sufficient to say, that such a person, according to the usage and custom of merchants drew the bill. On this custom is founded the action on a bill of exchange; and the action on a promissory note on the statute 3 & 4 Ann. c. 9. to which it usually refers.—When an action is brought on a bill of exchange it must be stated in the declaration that the drawer made his bill and directed it to the drawee, and thereby directed him to pay; and when on a promissory note, that the maker made his note, and thereby promised to pay. And as in transitory actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases; so in declaring on inland bills or notes, the same may be stated to have been made at any place where he chooses to lay his action, and then the trial must be in that county in which the declaration is laid; though if the defendant will make affidavit, that the cause of action arose not in that but in another county, the court will direct a change of the *venue* or *visne*, (that is the *vicinia* or neighbourhood in which the injury is declared to be done) and will oblige the plaintiff to declare in the proper county^c.—In declaring on a bill dated abroad it is usual to state the place where it bears date, and then to subjoin the county in England or Wales where the action is laid under a videlicet. However subjoining the county in England under a videlicet is not essentially necessary although the action be against the drawer, in which drawing of the bill ought to be proved, the want of the videlicet being supplied by the allegation that the drawer had notice of the drawee's refusal at the place where the action is laid; and in a late precedent of

^b It is so called from the power a person has by virtue of an office, to do certain acts without being applied to; as a justice of the peace may not only grant surety of the peace at the com-

plaint or request of any person, but he may demand and take it *ex officio* at discretion. Law's Disposal, 12.

^c 3 Black. Com. 294.

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a delaration by an eminent pleader the videlicet is omitted^d; yet it seems generally to be used, in deference to the antient rule of pleading with respect to the *venue*, as in the forms hereafter laid down in par. 6. 7.—If a bill of exchange be drawn at usance it must be averred what that usance is; as heretofore mentioned in C. III. § 11. par. 2. and hereafter shewn in par. 6.

THOSE are some of the general maxims which should be attended to in drawing the declaration, and for an illustration hereof we shall proceed with laying down some of the usual forms of a declaration, in actions on bills of exchange and promissory notes, making occasional remarks hereafter at the end of each form.

2. Declaration by Payee against Maker of a Note.

[*Middlesex*, to wit.] John Den complains of Richard Fen, &c. for that whereas the said Richard on the first day of January in the year of our Lord 1792, to wit, at Westminster in the county of Middlesex aforesaid, made his certain note in writing commonly called a promissory note, his own proper hand-writing being thereunto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said John and thereby promised to pay to the said John, by the name of John Den or order four months after the date of the said note, the sum of 100l. for value received by him the said Richard; by reason whereof and by force of the statute in such case made and provided, the said Richard became liable to pay the said John the said sum of money in the said note mentioned according to the tenor and effect of the said note: [*The following clause is unnecessary in an action against either the acceptor of a bill or maker of a note; and it seems doubtful whether it is essential in an action against either of the other parties.*] And being so liable he the said Richard in consideration thereof afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, undertook and faithfully promised the said John to pay him the said sum of money in the said note mentioned according to the tenor and effect of the said note. [*If neither of the counts hereafter inserted are added, the conclusion may be as follows.*] Yet the said Richard (although often requested) hath not yet paid to the said John the said sum of money in the said note mentioned, or any part thereof, or the value thereof, or of any part thereof, but hath wholly neglected and refused and still neglects and refuses so to do: wherefore the said John says he is injured, and hath sustained damages to the value of 100l. and therefore he brings suit, &c.

THE following counts commonly called the money counts, are usually inserted, the reason of which is shewn in C. X. § 1. par. 1.

[*Count for money lent.*] And whereas the said Richard afterwards, to wit, on the same day and year aforesaid at Westminster aforesaid was indebted to the said J. in another 100l. of lawful money of Great Britain for money by the said J. before that time lent and advanced to

^d Morg. Prcs. 47.

^e See Str. 224. Carth. 509. Salk. 128.

to the said R. and at his special instance and request ; and being so indebted he the said J. in consideration thereof, afterwards, to wit, on the day and year afore said at Westminster afore said undertook and then and there faithfully promised the said J. to pay him the said last mentioned sum of money when he the said R. should be thereto afterwards requested.

[*Money laid out.*] And whereas the said R. afterwards, to wit, on the same day, and year afore said, at Westminster afore said, was indebted to the said J. in another 100l. of like lawful money for money by the said J. before that time laid out, expended and paid for the said R. and at his special instance and request, and being so indebted he the said R. in consideration thereof, &c. [as in the above count for money lent].

[*Money had and received.*] And whereas the said R. afterwards, to wit, on the same day and year afore said, at Westminster afore said, was indebted to the said J. in other 100l. of like lawful money by the said R. before that time had and received to the use of the said J. and being so indebted he the said R. in consideration thereof, &c. [as above]

[*An account stated.*] And whereas the said R. afterwards, to wit, on the same day and year afore said, at Westminster afore said, accounted together with the said J. of and concerning divers other sums of money before that time due and owing from the said R. to the said J. and then being in arrears and unpaid, and upon that account he the said R. was then and there found in arrear to the said J. in another large sum of money, to wit, the sum of one other 100l. of like lawful money, and being so found in arrear he the said R. in consideration thereof afterwards, to wit, on the same day and year afore said, at Westminster afore said, undertook and faithfully promised the said J. to pay him the said last mentioned sum of money when he the said R. should be thereto afterwards requested. Yet the said R. not regarding his afore said several promises and undertakings so by him made in manner and form afore said, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said J. in this behalf hath not yet paid the said several sums of money or any part thereof to the said J. (although so to do he the said R. was requested by the said J. afterwards, to wit, on the same day and year afore said at Westminster afore said) but he to do this hath hitherto wholly refused, and still refuses to the said J. his damage of £. and therefore he brings his suit, &c.

It is usual to state as above that, the drawer of a bill or note subscribed it with his own hand-writing, yet it is unnecessary ; as the allegation that the drawer of a bill of exchange made his bill and directed it to the payee, by which he requested him to pay ; and that the maker of a promissory note thereby promised to pay, sufficiently imports his name was somewhere on the instrument, and that he or somebody by his authority wrote it^f.

WHERE

^f Ld. Raym. 1542. 1543. 1376. St. 899. 609.

WHERE a bill or note is drawn by a servant it may be stated as drawn by the master; but if the subscription be stated, it should be alledged to be drawn by the master's authority.

THE date, of a bill or note importing to be payable at a limited time after date, must be stated^a; and if a bill be made payable after sight it is usual to state the day of its date^b; though as to this latter, stating the day seems as immaterial as stating it where a bill or note is made payable on demand. If a bill or note imports to be payable at a limited time after date, and has no date, the time it issued or the day when the plaintiff knew of its existence should be stated; as that an instrument having no date is considered as dated at the time of the delivery^c.

DELIVERY of a bill or note to the payee, being essential to the validity thereof, the same must be stated.

If a bill be drawn payable to a man's order, as to the order of A. B. and not to A. B. or order, he may bring an action averring he made no order (*i*) or, such bill may be stated as made payable to the payee himself, or in the very words of it, like as where a bill is made payable to drawer or order, as in the form hereafter in par. 4.

WHERE two or more makers of a note thereby promise jointly and severally or, jointly *or* severally, the payee may sue them jointly, or he may sue any one of them at his election; and he may declare against any one of them in the terms of the note; for in an action against one, declaration that he and another or others made their promissory note, by which they jointly and severally, or jointly *or* severally promised to pay, will be good. If the makers promise only jointly, and not jointly and severally *or* severally, they must be sued jointly, and in the declaration the note must be stated in the terms of it as a joint note; for if it be stated as if several the defendant may plead that matter in abatement, though can take no advantage of it in error; as shewn in C. III. § VI. No. III.

3. *Indorsee against Indorser of a Note.*

Middlesex, to wit.] George Hen complains of John Den, &c. for that whereas one Richard Fen on the first day of January in the year

^a *Cole and Fawcner*, Pas. 12 Ann. Str. ^b *Ld. Raym.* 1676.

^c 22. (*i*) *Law of Nisi Prius*, 273.

• As in *Morgan's Prec.* 58. 63. 68.

year of our Lord 1791, to wit, at Westminster in the county of Middlesex aforesaid, made his certain note in writing commonly called a promissory note, his own proper hand-writing being thereunto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said J. and thereby promised to pay to the said J. by the name of J. D. or order four months after date of the said note the sum of 100l. for value received by him the said Richard; and the said J. to whom or to whose order the payment of the said sum of money in the said note specified was to be made, afterwards and before the payment of the said sum of money in the said note specified or any part thereof, and also before the time appointed by the said note for the payment thereof, to wit, on the same day and year aforesaid at Westminster aforesaid, indorsed the said note, his own proper hand being thereto subscribed, and by that indorsement he the said J. appointed the contents of the said note to be paid to the said G. and then and there delivered the said note so indorsed to the said G. And the said G. avers that he the said G. did afterwards, to wit, on the day of in the year aforesaid, at Westminster aforesaid, shew and present the said note so indorsed as aforesaid, to the said R. F. for payment thereof, and the said R. F. then and there had notice of the said indorsement so made thereon as aforesaid, and was then and there requested to pay the said sum of money therein specified to him the said G. according to the tenor and effect of the said note and of the said indorsement so made thereon, but the said F. did not then or at any other time pay the said sum of money in the said note mentioned or any part thereof to the said G. but then and there wholly refused to pay the same, of all which said premises the said J. afterwards and after the expiration of the said four months, to wit, at Westminster aforesaid had notice. By reason of which premises and by force of the statute in such case made and provided, the said J. became liable to pay the said G. the said sum of money in the said note mentioned, according to the tenor and effect of the said note and the indorsement so made thereon as aforesaid, when he should be thereto afterwards requested, and being so liable he the said J. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, undertook and faithfully promised the said G. to pay him the said sum of money in the said note specified, when he should be thereto afterwards requested. [Here may be added *counts. for money lent, money had and received, money laid out, an account stated, as in paragraph 2.* with a similar conclusion to what is there inserted.]

In an action by indorsee on a bill or note payable to order, must be stated such indorsements as to shew his title; and such bill or note not being transferable but by indorsement, as shewn at the beginning of C. VI. that of the payee must consequently be stated; and if the negotiability of the bill be not restrained by indorsement (as treated on in C. VI. § 1. § 11.) that alone may be stated, though there are other indorsements on the bill, and the plaintiff may declare as indorsee to the first indorser,

as in *Peacock v. Rhodes*, in C. VII. § IV. par. 3. If other indorsements are stated the same must be proved; if not stated must be struck out either at the time of trial or before, in order to render the evidence correspondent with the declaration. —If a bill be indorsed to indorsee, as executor, he may declare as such; as is shewn in C. VI. § VI. par. 2.

WHETHER the indorsement on a bill or note be a blank, or a full indorsement, it is usually stated alike, as in the above form, and the forms hereafter in par. 5. 7.

WHERE there are several indorsements on a bill or note, and the plaintiff would only state the first, he should state it as an indorsement immediately to him, like as above stated.

WHEN the action is against the indorser of a note, it is unnecessary to state that the indorsee demanded payment of him; and so when the action is against an indorser of a bill, it is unnecessary to state demand of payment made either on him or the drawer; such demand not being requisite, in order to complete the title of the indorser, as demonstrated in C. VIII. § II. But that demand of payment must be stated to have been made on the maker of the note and acceptor of the bill, and notice of refusal given the party against whom the action is brought, in order to intitle the plaintiff to maintain his action, is apparent from the case of *Rushton v. Aspinall* in Error Trin. 21 Geo. III. wherein lord Mansfield delivering the opinion of the court of King's Bench says, The two objections insisted upon, are, 1. That the declaration does not allege a demand on the acceptor. 2. That it does not state notice to the defendant, of the acceptor's refusal to pay. The answer was, that, after verdict, it must be presumed, that those facts were proved at the trial. On looking into the cases we find the rule to be; that, where the plaintiff has stated his title, or ground of action defectively or inaccurately,—because, to intitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,—it is a fair presumption, after a verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. In the present case, it was not requisite for the plaintiff to prove, either the demand on the acceptor, or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were to be presumed to have been proved, no proof at the trial can make good a declaration

claration, which contains no ground of action on the face of it. The promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn. I see, in a note of a case [*Avery v. Hoole*] in this court in Easter Term 18 Geo. III. I am stated to have said; "A verdict will not mend the matter where the *gift* of the case is not laid in the declaration, but it will cure ambiguity;" and there is a strong case in print of an action for keeping a malicious bull [in 2 Salk. 662.] where the *scienter* having been omitted in the declaration, it was held bad after verdict.—Judgment for the plaintiff in Error^k.

HENCE we may remark the need there is of stating the plaintiff's title or cause of action in the declaration so, as thereby not only to prevent a demurrer to the declaration and issue being joined on matter of fact, but likewise for maintaining judgment when obtained, against a writ of error that may be brought by the defendant. If the thing omitted in the declaration be essential to the action it cannot be cured by a verdict^l. However if the plaintiff's title be only imperfectly stated in some cases no advantage can be taken thereof on a general demurrer, much less after verdict; as exceptions that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer^m.—Although due notice of the dishonour of a foreign bill must be by protest; as shewn in C. V. § II. Yet in *Solomon v. Stavely*, King's Bench Mich. 24 Geo. III. which was an action on a foreign bill of exchange, the court held on the authority in the precedent *Dunstar v. Pierce* Lill. Ent. 55. that the omitting to allege, in the declaration, a protest of the bill, is only matter of form, and cannot be taken advantage of on a general demurrerⁿ.

4. *Declaration upon an inland bill payable to Drawers or their Order, by Drawers Partners against Acceptor.*

[*Middlesex*, to wit.] John Den and Joseph Den, complain of Richard Fen, &c. for that whereas, at the several times hereafter mentioned, they the said John Den and Joseph Den, and the said Richard, were persons residing, trading, and using commerce within this kingdom, to wit, at Westminster in the county of Middlesex aforesaid, and the said John Den, and Joseph Den, at the said several times were there partners and joint dealers together in trade and commerce; and being so resident and trading, and the said John
Den

^k Doug. Rep. 679. 2 Edit.

^l 3 Black. Com. 395.

^m *Ibid.* 394.

ⁿ Doug. Rep. 684. 2 Edit.

Den and Joseph Den so being partners and joint dealers together, they the said John Den and Joseph Den on the first day of January in the year of our Lord 1790, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, made their certain bill of exchange in writing subscribed with the proper hand-writing of one of them, for and on account of the joint trade and partnership, according to the custom of merchants used and approved of within this kingdom, from time immemorial, the same bill bearing date the day and year aforesaid, directed to the said Richard by the name of Mr. Richard Fen, merchant in Westminster, and by the said bill requested the said Richard to pay three months after date to them the said John Den and Joseph Den, or their order 100l. value received, as advised by the said John Den and Joseph Den, which said bill of exchange the said Richard afterwards, and before the time appointed by the said bill, for the payment of the said sum of money specified in the said bill, to wit, on the day and year aforesaid at Westminster aforesaid, upon sight thereof accepted, according to the said custom; by reason whereof and according to the said custom, and by the law of merchants, the said Richard became liable to pay to them the said John Den and Joseph Den, the said 100l. specified in the said bill, according to the tenor and effect of the said bill, and of his said acceptance thereof, and being so liable he the said Richard in consideration thereof afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, undertook and faithfully promised the said John and Joseph to pay them the said sum of money in the said bill mentioned according to the tenor and effect of the said bill. [Here may be added *counts, for money lent, money had and received, money laid out, an account stated; as in paragraph 2.* with a similar conclusion to what is there inserted.

IN case of partners being concerned in the drawing, indorsing, or accepting a bill or note, it is usual to mention the partnership as above, and state that one of the partners according to the custom of merchants, subscribed, accepted, or indorsed the bill for the partnership account. However it seems unnecessary to set out any part of the custom or even refer thereto, or that the partner acting for the rest subscribed for the partnership, for if it appear that he did so it will be sufficient °.

WHEN the action is against an acceptor it must be alledged that he accepted the bill, but the manner in which he accepted it need not be alledged °.—If the plaintiff alledge the acceptance to be made before the time limited by the bill for payment,

2 Ld. Raym. 175. 1484.

Str. 817.

ment, he will be precluded from giving in evidence an acceptance afterwards; but if the acceptance was after the time of payment, and the plaintiff alledge generally, without mentioning the time, evidence of acceptance after the time of payment will maintain the declaration¹.

If the acceptor of a bill has refused payment and the bill is taken up by the drawer, its negotiability ceases, and the drawer cannot afterwards maintain an action thereon as indorser against the acceptor²; though it has been held otherwise³. In *Berk v. Robley*, above cited, where the action was by an indorsee of a bill of exchange against the acceptor; it appeared in evidence, that Brown drew a bill of exchange upon Robley, payable to Hodgson or order; which was accepted by Robley, and indorsed by Hodgson. Not being paid when due, Hodgson returned the bill, and Brown took it up, Hodgson's indorsement still remaining. Brown afterwards gave the bill to Berk, as a security for money, and when he gave it, acquainted Berk with the whole transaction, but did not tell him whether Robley had effects in his hands. Upon this evidence the jury found a verdict for the defendant, being of opinion, that the acceptor was discharged by Brown's taking up the bill, and that there was an end of its negotiability.—Mansfield, plaintiff's counsel, moved for a new trial, on the ground that the jury had mistaken the law. He insisted, that the drawer of a bill, which in the course of circulation came back to his hands, might maintain an action as indorsee; (Mr. J. Ashurst said he remembered several instances of such actions) and here the bill was indorsed to Brown, who might either have maintained his action as indorsee, or put it again in circulation, unless the acceptor's refusal to pay could prevent the negotiability of it, which certainly could not be the case.—Wallace, defendant's counsel, *contra*. A bill of exchange is payable at a given time, and is till that time negotiable. If payment is then refused, it goes back to the drawer, and when he has taken it up there is an end of it. If it was otherwise, Hodgson would be liable, who certainly never meant that his name should give a title to the bill after it had been returned to the drawer.

LORD MANSFIELD. I first thought at the trial, that the action was maintainable, but am now clearly satisfied, that the jury did

¹ *Ld. Raym.* 365. ² *Salk.* 127. 129.

³ *Berk v. Robley*, *Trin.* 14 *Geo.* III.

K. B. 1 *H. Black. Rep.* 89. n.

⁴ *Lovere v. Laubray*, *Trin.* 10. *Ann.* K. B. 10 *Mod.*

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did right. When a draft is given, payable to A. or order, the purpose is, that it shall be paid to A. or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable, Hodgson would be liable, for which there is no colour.—Rule for a new trial refused.

A. HAVING declared on a promissory note against B. made by C. to A. by him indorsed to B. and by him again indorsed to A. and having obtained a verdict, the judgment was arrested. The motion in arrest of judgment was made, upon the ground that nothing appeared to be due to the plaintiff on his own shewing; for the defendant would be entitled to recover back again the identical sum from the plaintiff for which he had now obtained a verdict against the defendant; and therefore as this would introduce a circuitry of action, which the law does not permit, the declaration was bad upon the face of it.—Lord Kenyon, chief justice: it is an invariable rule that every plaintiff must on his own stating of the case, shew sufficient to entitle him to recover judgment against the defendant. And it is a rule equally clear that every instrument ought to be declared on according to its legal import. I do not say but that there may be circumstances which if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note: but we are now called upon to form a judgment on the title which he has disclosed. And on the face of the declaration he has stated the note as a legal existing note, and the indorsements as legal existing indorsements; we are therefore bound to consider them to be so. Then the case stands thus; that he, the plaintiff, being the original indorser of the note, calls on the defendant who appears on the record to be a subsequent indorsee. And nothing can be clearer in law than that an indorsee may resort to either of the preceding indorsers for payment: Whereas the present action is an attempt to reverse this. I admit that a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note, *e. g.* that his own name was originally used for form only, and that it was understood by all the parties to the instrument that the note, though nominally made payable to the plaintiff, was substantially to be paid to the defendant: but if such were the case, the note should have been declared on according to its legal import; as was held in *Minet v. Gibson*, (in C. II. § 11. par. 13). A name may be omitted in the declaration, if the legal operation of the instrument requires it. But in this case the plaintiff has stated facts subversive of his title.

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* *Bishop v. Hayward*, Mich. 32. Geo. III. 4 Durnf. & East. Rep. 470.

IN the action by drawer against acceptor after payment of the money in his default, should be stated the drawing and delivery of the bill, that it was presented to the acceptor for payment, his refusal; or that he could not be found, that it was returned to the drawer, and that the acceptor had notice; and (if a foreign bill) the protest, interest, &c. should be stated, as in the form laid down hereafter in par. 6.

5. *Declaration upon an Inland Bill of Exchange, Indorsee against the Acceptor, where the Indorsers are Partners.*

[*Middlesex*, to wit.] John Den complains of Richard Fen, &c. for that whereas, at the several times hereafter mentioned, the said John and Richard, and Thomas Ben and Charles Gatward and William Gatward, were persons residing, trading and using commerce within this Kingdom, to wit, at Westminster within the county of Middlesex aforesaid, and the said Charles Gatward, and William Gatward, were at those several times there partners and joint dealers in their said trade and commerce, and being so residing and trading, and the said Charles Gatward and William Gatward, so being partners, the said Thomas Ben on the first day of January in the year of our Lord 1791, at Westminster aforesaid, made his certain bill of exchange in writing, subscribed with his own proper hand-writing according to the custom of merchants from time immemorial, used and approved within this Kingdom, the said bill bearing date the same day and year aforesaid directed to the said Richard Fen, by the name of Mr. Richard Fen, of Westminster, merchant; and by the said bill requested the said Richard Fen, 30 days after date, to pay to the said Charles Gatward and William Gatward, by the name and description of Mr. Charles Gatward and Co. or order, 100l. value received, as by advice, which said bill of exchange the said Richard Fen, afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, upon sight thereof accepted according to the said custom; and the said Charles Gatward, and William Gatward, to whom or to whose order the payment of the said sum of money in the said bill mentioned, was to be made; afterwards and before the payment of the said sum of money in the said bill mentioned or any part thereof, and also before the time appointed by the said bill for the payment thereof, to wit, on the day and year aforesaid, at Westminster aforesaid, indorsed the said bill in writing in the name and style of their partnership, to wit, Charles Gatward and company; the said name of Charles Gatward and company being thereunto subscribed by one of them, and by that indorsement the said Charles Gatward, and William Gatward, appointed the contents of the said bill to be paid to the said John Den, and then and there delivered the said bill so indorsed to the said John Den; of which said indorsement so made on the said bill as aforesaid, the said Richard Fen, afterwards, to wit, on the same day and year aforesaid at Westminster aforesaid, had notice: by reason of which said premises and according to the said custom and by the law of merchants, he the said Richard Fen became liable to pay the said

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John, the said 100l. in the said bill mentioned according to the tenor and effect of the said bill and of the said indorsement so made thereon as aforesaid, and of his said acceptance thereof, and being so liable, he the said Richard in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, undertook and faithfully promised the said John to pay him the sum of money in the said bill mentioned, according to the tenor and effect of the said bill. [Here may be added *counts for money lent, money had and received, money laid out, an account stated*; as in paragraph 2. with a similar conclusion to what is there inserted.]

6. *Declaration upon a Foreign Bill of Exchange drawn in sets, payable at two Usances and protested. Drawer against Acceptor.*

[*Middlesex*, to wit.] John Den complains of Richard Fen, &c. for that whereas, at the several times hereafter mentioned the said John and Richard and one Thomas Ben, were merchants respectively residing, trading, and using commerce, to wit, the said John in parts beyond the seas, that is to say at Leghorn, and the said Richard and Thomas Ben within this Kingdom, to wit, at Westminster, in the county of Middlesex aforesaid, and being so respectively resident, trading, and using commerce, the said John on the 1st day of January in the year of our Lord 1791, in parts beyond the seas (that is to say) at Leghorn aforesaid, to wit, at Westminster aforesaid, according to the custom of merchants within this kingdom used and approved of from time immemorial, made his certain bill of exchange in writing, his own proper hand writing being thereunto subscribed, the said bill bearing date the same day and year aforesaid, directed to the said Richard, by the name of Mr. Richard Fen, merchant in Westminster, and by the said bill requested the said Richard, at two usances to pay that his first bill of exchange (second and third of the same tenor and date not paid) to the said Thomas Ben, or order, 100l. sterling, value received, as advised by the said John, and then and there delivered the said bill to the said Thomas Ben, which said bill of exchange the said Richard, afterwards, to wit, upon the day of in the year aforesaid, at Westminster aforesaid, upon sight thereof accepted according to the said custom: and the said John in fact says, that an usance between Leghorn aforesaid and Westminster aforesaid, is and from time whereof the memory of man is not to the contrary, hath been three months, and the said John saith that although the said Thomas Ben afterwards and when the said bill had according to the tenor and effect thereof become payable, to wit, on the day of in the year aforesaid, at Westminster aforesaid, shewed and presented the said bill to the said Richard for payment thereof, and then and there requested him to pay the money therein mentioned, to him the said Thomas Ben, according to the tenor and effect of the said bill, and of his the said Richard's acceptance thereof, yet the said Richard did not when the said bill was so shewn and presented unto him for payment thereof, or at any other time, pay to the said Thomas Ben

Ben the said sum of money in the said bill mentioned, or any part thereof, but wholly neglected and refused so to do, *neither did he pay the said second or third of exchange in the said bill mentioned, or either of them, [this latter allegation is unnecessary when the plaintiff states as above stated, but if he states, that the drawer made a certain bill of exchange in three parts, and by one of these parts requested the drawee (neither of the others being paid) to pay that; that that part was presented, and the drawee refused to accept or pay it, such allegation is essential]* whereupon afterwards, to wit, on the day of in the year aforesaid, at Westminster aforesaid, the said bill of exchange at the request of the said Thomas Ben, was protested for non-payment, according to the usage and custom of merchants, and returned unto the said John: of all which said premises the said Richard afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, had notice: by reason whereof, and according to the said usage, and by the law of merchants, the said Richard became liable to pay to the said John the said sum of money in the said bill mentioned, according to the tenor and effect of the said bill and of his acceptance thereof, together with a large sum of money, to wit, the sum of 10l. for the interest, exchange, re-exchange, costs, and damages, which accrued from delaying payment of the said bill, when he should be thereto afterwards requested, and being so liable he the said Richard in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, undertook and faithfully promised the said John to pay him the said sum of money in the said bill mentioned, and the aforesaid sum of money, for the interest, exchange, re-exchange, costs, and damages, which accrued by the delaying payment of the said bill, when he the said Richard should be thereto afterwards requested. [Here may be added *counts for money lent, money had and received, money laid out, an account stated, as in paragraph 2. with a similar conclusion to what is there inserted.*]

7. *Declaration upon a Foreign Bill of Exchange protested, second Indorser against first Indorser. Drawers Partners.*

[*Middlesex, to wit.*] John Den complains of Richard Fen, &c. for that whereas certain persons trading and using commerce in co-partnership together within this kingdom, to wit, at Westminster in the county of Middlesex, aforesaid, under the name, style, and firm, of Saunders and Co. on the 1st day of January in the year of our Lord 1791. at Westminster aforesaid, according to the usage and custom of merchants from time immemorial used and approved made their certain bill of exchange in writing, their co-partnership name, style, and firm aforesaid being thereunto subscribed, bearing date the day and year aforesaid, and directed to one Thomas Travers, of Venice in Italy, in parts beyond the seas, and thereby requested the said Thomas six months after date to pay to the said Richard by the name and description of Mr. Richard Fen, or order, a certain sum of money called in the said bill 1000 ducats, value received, and then and there delivered the said bill to the said Richard, which said bill the said

Thomas

Thomas Travers afterwards, to wit, on the day and year aforesaid, at Venice, to wit, at Westminster aforesaid, on sight thereof duly according to the usage and custom of merchants accepted; and the said Richard afterwards, and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid, at Westminster aforesaid, by his certain indorsement in writing then and there made upon the said bill, his proper hand being thereunto subscribed, according to the usage and custom of merchants, appointed the contents of the said bill to be paid to one William Wright, and then and there delivered the said bill so indorsed to the said William, and the said William afterwards and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid at Westminster aforesaid by his certain indorsement in writing then and there made upon the said bill, his proper hand being thereunto subscribed, appointed the contents of the said bill to be paid to the said John, and then and there delivered the said bill so indorsed to the said John, of which said indorsement the said Thomas afterwards, to wit, on the day and year aforesaid at Venice, to wit, at Westminster aforesaid, had notice. And the said John says, that afterwards and when the said bill had according to the tenor and effect thereof become payable, to wit, on the day of in the year aforesaid, at Venice aforesaid, to wit, at Westminster aforesaid, the said bill was duly, according to the usage and custom of merchants, shewn and presented to the said Thomas for payment; and the said Thomas was then and there requested to pay the said sum of money in the said bill mentioned, but the said Thomas did not then and there pay the said sum of money in the said bill mentioned, or any part thereof, but wholly neglected and refused so to do, *nor did the said persons so trading and using commerce in co-partnership together, under the name, style, and firm of Saunders and Co. pay the said sum of money in the said bill mentioned or any part thereof.* [This allegation, though commonly used, is unnecessary.] And thereupon the said John afterwards, to wit, at Venice aforesaid, to wit, at Westminster aforesaid, according to the usage and custom of merchants, caused the said bill to be protested for non-payment, of all which said premises the said Richard afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, had notice. And by reason thereof, and by force of the usage and custom of merchants, became liable to pay the said John the said sum of money in the said bill mentioned, or the value thereof, when he the said Richard should be thereunto afterwards requested. And being so liable, he the said Richard in consideration thereof afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, undertook, and to the said John then and there faithfully promised to pay to him the said sum of money in the said bill mentioned, or the value thereof, when he the said Richard should be thereunto afterwards requested. And the said John avers that the

faid 1000 ducats in the faid bill mentioned, on the day and year laſt aforeſaid, were, and from thenceforth hitherto have been, and ſtill are of great value, to wit, of the value of £. [Here may be added *counts for money lent, money had and received, money laid out, an account ſtated, as in par. 2. with a ſimilar concluſion to what is there inſerted*].

§ II. OF the proof required by plaintiff in proſecuting his ſuit. 1. As concerning who are and are not competent witneſſes, being largely treated in C. X. we ſhall here proceed to treat on the proof required in an action againſt the different parties to a bill or note, obſerving that proof muſt be of ſo much as is neceſſary to entitle the plaintiff to his action, and of what in his declaration muſt be ſtated, except what is neceſſarily admitted; as that in an action againſt the acceptor, the drawer's hand is admitted, and if the acceptance was made after ſight of the bill, the acceptor is not allowed to diſpute either the ability of the drawer or his ſignature; though if the acceptance was made without ſight of the bill, as it may be in various inſtances demonſtrated in C. IV. the drawer's ſignature muſt be proved; but when made after ſight of the bill whether by writing or parol, it is a ſufficient acknowledgement on the part of the acceptor, who muſt be ſuppoſed to know the hand of his correſpondent; therefore in an action againſt the acceptor, the plaintiff ſhall not be put to prove the hand of the drawer^a. But if the acceptance was without ſight of the bill, the ſignature of the drawer muſt be proved; and in an action againſt the acceptor of a bill or maker of a note the plaintiff muſt prove the defendant's ſignature, or the parol acceptance of a bill, and ſuch indorſements through which he derives his title; of which we ſhall proceed to treat, and hereafter in par. 2. of where the action is by an indorſee againſt the drawer of a bill. In par. 3. of where it is by an indorſee againſt an indorſer. In par. 4. of where it is by the drawer againſt the acceptor. In par. 5. of actions on promiſſory notes. In par. 6. ſhew that the ſignature of the party againſt whom the action is brought, may be proved by evidence of his having confeſſed the ſame. In par. 7. treat on the proof when a bill or note is made, accepted or transferred, by a partner or ſervant.

IN an action by an indorſee againſt an acceptor, the defendant's ſignature or parol acceptance muſt be proved, and ſuch indorſements through which the indorſee derives his title. And where a bill is made payable to order, which as ſhewn at the beginning of C. VI. cannot be transferred without indorſement, it is now ſettled by the caſe of *Smith v. Cheſter*, which

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^a Law of Niſi Prius, 270. Edit. 1785.

we shall presently relate, that in an action by an indorsee against the acceptor of a bill payable to order, the hand-writing of the payee or first indorser must be proved, and that notwithstanding such indorsement was on the bill at the time it was accepted. And as a subsequent indorsee may declare as indorsee of the first indorser; as heretofore shewn in § 1. par. 3. proof of such indorsement may be only requisite; but if other indorsements are stated the same must be proved.—The like proof must be of demand of payment, as is mentioned hereafter in par. 4.

IN case of a bill or note lost, or stolen, which is payable to bearer, and transferrable by delivery; or, when made payable to order and is indorsed blank, the plaintiff hath usually been called upon to prove that he took the same in the regular course of trade, or that he gave a valuable consideration for it, and had no knowledge of its being stolen; as in the cases of *Peacock v. Rhodes*, in C. VII. § IV. par. 3. *Grant v. Vaughan*, in C. VI. § V. *Miller v. Race*, hereafter in § VI.

IN the above-mentioned case of *Smith v. Chester*, Easter, 27 Geo. III. the action was by an indorsee of a bill of exchange against the acceptor, and it appeared at the trial before justice Buller, at the last sittings at Westminster, that when the bill was accepted there were several indorsements on it. But the plaintiff not being able to prove the hand-writing of the first indorser was non-suited.—In this term, Bower, plaintiff's counsel, moved the court of King's Bench to set aside this nonsuit, on the ground that as these indorsements were on the bill at the time of the acceptance, they must be taken to have been admitted by the drawee, and he could not afterwards dispute them; and he cited in support of this a determination of lord Mansfield's in the case of *Pratt v. Howison*, at the sittings after Trin. Term, 23 Geo. III. at Guildhall, and another case in *Sayer* 223. observing that there would be great hardship in the case of foreign bills of exchange in many instances, on account of the difficulty and inconvenience of proving the hand-writing of the first indorser, who may be unknown to the holder.

BUT by JUSTICE ASHHURST: The law has been otherwise settled. And if it were not so, there would be no difference in this respect between bills payable to order, and those payable to bearer. And it would open a door to great fraud.—JUSTICE BULLER: This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the hand-writing of the first indorser. For when a bill is presented for acceptance, the acceptor only

looks to the hand-writing of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable even though the bill be forged.—JUSTICE GROSE: This matter appears extremely clear; for a bill of exchange is no payment to the person in whose favour it is drawn, unless it is indorsed by him.—Rule discharged^b.

SINCE the determination of the case of *Smith v. Chester*, the decision thereof has undergone a thorough investigation, as well in the cases which so long agitated the commercial world on the subject of indorsements in the name of fictitious payees, treated on in C. II. § 11. par. 13. as in divers other cases; and the general rule now established, as that to entitle the holder of a bill payable to order to recover against the acceptor, it is necessary that he should prove the hand-writing of the payee or first indorser; by a very late case is expressed with somewhat more particularity than heretofore; as that it is incumbent on a plaintiff, who sues on a bill of exchange payable to order, to prove the indorsement of the *very* person to whom it was made payable by the intention of the drawer. As in *Mead v. Young*, Mich. 31 Geo. III. This was an action brought by the indorsee of a bill of exchange for 90l. against the acceptor. The bill was drawn at Dunkirk by Christian, on the defendant in London, payable "to Henry Davis, or order;" and having been put into the foreign mail, enclosed in a letter from Christian, it got into the hands of another *Henry Davis* than the one in whose favour it was drawn. The defendant accepted the bill; and when Davis desired the plaintiff to discount it, the latter made application to the defendant to know whether or not it was his acceptance; and on receiving an answer in the affirmative, coupled with an assurance that it was a good bill, he discounted it, not knowing the H. Davis from whom he took it. There was no ground to impute any fraud to the plaintiff. On the trial before lord Kenyon, after the plaintiff had proved the defendant's hand-writing, and the indorsement by Davis, the defendant offered evidence to shew that the H. Davis, who indorsed to the plaintiff was not the real H. Davis in whose favour the bill was drawn: but lord Kenyon being of opinion that such evidence was inadmissible, the plaintiff recovered a verdict. A rule having been obtained to shew cause why a new trial should not be granted on this misdirection.—After argument by counsel the judges delivered their separate opinions.

LORD KENYON chief justice. The question here is, whether the name of H. Davis, to whom the bill on the face of

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^b 1 Duránf. & East, Rep. 654.

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it was payable, shall or shall not convey a title to this plaintiff, who gave a valuable consideration for it, and who discounted it with the name of H. Davis upon it, and with an assurance from the defendant that it was accepted by him. If any fraud, or even neglect, could be imputed to the plaintiff, that would vary the case: but, circumstanced as these parties were, I think that, if the plaintiff cannot recover, it will put an insuperable clog on this species of property. I cannot distinguish this case on principle from that of *Miller v. Race*, [hereafter in § VI.] where the innocent holder of a note which had been taken when the mail was robbed, was held entitled to recover; that indeed was a note payable to bearer, but still the same principle must govern both cases. In this case the fault originated with the drawer of the bill, in not describing more particularly the person to whom he intended it should be paid. The plaintiff was not bound to send to Dunkirk to know whether the person, who had possession of the bill, was or was not the real H. Davis. There may indeed be some inconvenience the other way; but setting the inconvenience on the one side against that on the other, in my apprehension it would throw too great a burthen on persons taking bills of exchange, to require proof of an indorsee that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action: and therefore I think that, as there was no fraud, or want of due diligence on the part of the plaintiff, he is entitled to recover; however I give this opinion with some diffidence, as my brothers have intimated that they are of a different opinion.

JUSTICE ASHHURST. This is a case of considerable importance; and I think that we ought to grant a new trial, that the parties may have an opportunity of putting the question on the record. The present inclination of my opinion is with the defendant. In order to derive a legal title to a bill of exchange, it is necessary to prove the hand-writing of the payee; and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery: and no title can be derived through the medium of a fraud or forgery. This is distinguishable from the case of *Miller v. Race*; for there the note was payable to bearer: in such cases the bearer, who purchases for a valuable consideration, and without

* See Dean's Case, heretofore in C. VII. § v. par. 9.

without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge to the drawer, but in this case the bill was drawn payable to H. Davis, or order; and though the name of H. Davis were indorsed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be satisfied that that was the indorsement of the real payee.

JUSTICE BULLER. As the bill in this case is of great value, the parties may put this question in a mode to be decided by the *dernier resort*. As at present advised, I entertain the same opinion as my brother Ashurst. If we were to inquire whether any *laches* were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more in fault than any other person, in advancing his money to H. Davis, who was a total stranger to him. But without going into any such inquiry, I am of opinion that it is incumbent on a plaintiff, who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable: The general form of the declaration shews that it is so; for that is, that "the said A. B. to whom, or to whose order, the payment of the said sum of money mentioned in the said bill was to be made, afterwards, &c. indorsed the said bill, his own proper hand-writing being thereunto subscribed." Now here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable; and no indorsement by any other person will give any title whatever. Then, is there any thing in this case that stops the defendant from saying that the person who indorsed to him was not the real payee? Now the act of that person who indorsed, and who in so doing was guilty of a forgery, cannot prevent an innocent person from shewing the truth. Then it was argued that Christian was guilty of negligence, in not describing more particularly the payee, but I know of no authority which requires that to be done. This bill was drawn in the common form, payable "to H. Davis or order;" and the drawer could not foresee that it would get into the possession of any other H. Davis. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill; and it cannot make any difference whether such stranger bear the same name with the real payee or not; for no person can give title to a bill but he to whom it is made payable. Independently of these reasons, I think that convenience requires that the determination should be in favor of the defendant. I have

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no difficulty in saying that this H. Davis, knowing that the bill was not intended for him, was guilty of a forgery; for the circumstance of his bearing the same name with the payee cannot vary this case, since he was not the same person. Then if the plaintiff cannot recover on this bill, he will be induced to prosecute the forger; and that would be the case even if it had passed through several hands, because each indorser would trace it up to the person from whom he received it, and at last it would come to him who had been guilty of the forgery: whereas if the plaintiff succeed in this action, he will have no inducement to prosecute for the forgery; the drawer, on whom the loss would in that case fall, might have no means in discovering the person who committed the forgery, and thus he would probably escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But at all events the plaintiff cannot recover, since he derives his title under a forgery.

JUSTICE GROSE. I am of opinion that it was competent to the defendant to shew in evidence that the person, who indorsed to the plaintiff, was not the person named as the payee in this bill of exchange; and I form that opinion as well on the substance of the transaction as on the form of pleading in such cases. A bill of exchange is only a transfer of *a chose in action* according to the custom of merchants; it is an authority to one person to pay to another the sum which is due to the first, and it is generally directed to be paid to the payee or his order. When the person, on whom it is drawn, accepts, he only engages by the terms of his acceptance to pay the contents of the bill to the person named in it, or his order; The general form of the declaration which is to be found in some of the old entries also agrees with this doctrine, and points out what the law is: I observe indeed that this declaration is not drawn in the usual form, for the words "to whom" or "to whose order" are omitted; but still it is that the said H. Davis, that is the same H. Davis who is mentioned in a former part of the declaration as the payee, indorsed to the plaintiff. It clearly therefore appears that as no person can demand payment of a bill of exchange but the payee, or the person authorized by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person. If he pay the amount of the bill to any other person, he pays it in his own wrong, and such payment does not discharge his debt to the drawer. If
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this decision will prove a clog on the circulation of bills of exchange, I think it will be less detrimental to the public, than permitting persons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we consider the definition of it; which is, the false making of any instrument, indorsement, &c. with intent to defraud. It makes no difference whether the person making this false indorsement were or were not of the same name with the payee, since he added the signature of H. Davis, with a view to defraud, and knowing that he was not the person for whom the bill was intended. I agree also with my brother Buller, that this decision will be more convenient to the public; because then the plaintiff will prosecute the person, who indorsed to him, for the forgery. For these reasons I am of opinion that, as this bill of exchange was only payable to the payee or his order, it was competent to the defendant, the acceptor, to inquire whether the person under whom the plaintiff claims, were or were not the payee.—Rule absolute^a.

2. WHERE the action is by an indorsee against the drawer of a bill, the plaintiff must prove such indorsements through which he derives his title, and as are stated in his declaration, in which that of the payee must be stated; and stating that alone may be sufficient for the plaintiff to maintain his action, though there are other indorsements on the bill; which if stated must be proved, if not stated must be struck out either at the time of trial or before; as heretofore shewn in § 1. par. 3. The drawer's hand-writing must also be proved; the presentment of the bill; the non-acceptance or non-payment, and either the notice with (in case of a foreign bill) the protest, or that he has pursued such diligence with respect to the drawee, and given such notice to the drawer of his default, as is necessary on behalf of the indorsee to entitle him to have recourse to the drawer.

If a bill has been protested, producing the protest will be sufficient evidence thereof and of non-payment, without proving the hand of the notary; and all foreign courts give credit thereto; and the protest is evidence that the bill is not paid; but here in England the bill as well as the protest must be produced, because the whole declaration must be proved; as shewn in C. V. § 11. par. 1.—Notice of a bill being dishonoured, should be by the next post, where the parties live at a distance, and proof of putting a letter in the post-office for this purpose will be sufficient evidence^b; though in *Dale v. Lubeck*, Trin. 2. Geo.

II. where

^a 4 Durnf. & East, Rep. 28.

^b See heretofore, C. VIII. § 14.

II. where notice was given by the indorsee to the acceptor before he commenced his action, that he must provide the money ; it was offered in evidence, that he gave him notice by sending him a letter so to do. The chief justice said that he did not think the bare sending a letter to the post-house would be sufficient evidence of notice, without some further proofs of the acceptor's receiving it ; and besides he said that generally a personal demand is expected^c.

3. IF the action be by an indorsee against an indorser, neither the hand of the drawer, acceptor, or any prior indorser to him against whom the action is brought is required to be proved ; and if the bill be forged the indorser is liable ; as shewn in C. VII. § VI. par. 1. But presenting the bill to the drawee, and notice to the defendant of his refusal must be proved, like as in the action against the drawer, above mentioned. In this action no proof is requisite of demand of payment on the drawer, or notice of non-payment by the acceptor given him, such demand and notice being held unnecessary ; as shewn in C. VIII. § II. If the action be by an indorser who has paid the money, proof must be of the payment ; as in *Mendez v. Carreroon*, Mich. 18. W. III. on the evidence at the trial before Holt, chief justice, at Guild-Hall, the case was thus ; A. drew a bill of exchange on B. payable to C. at Paris ; B. accepted the bill, C. indorsed it, payable to D. D. to E. E. to F. and F. to G. G. demanded the bill to be paid by B. and on non-payment G. protested it within the time, &c. and then G. brought an action against D. and it was well brought and he recovered. Afterwards D. brought an action against B. and though D. produced the bill and the protest, yet, because he could not produce a receipt for the money paid by him to G. on the protest, as the custom is among merchants, as several merchants on their oaths affirmed, he was non-suited : but Holt seemed to be of opinion, that if he had proved payment by him to G. it had been well enough^d.

4. WHERE the action is by the drawer against the acceptor, the signature of the latter, or his parol acceptance must be proved ; likewise demand of payment made on him, and his refusal to pay ; or, due diligence used to make it.

5. IN actions on promissory notes, the like proof is required as in actions on bills of exchange. The former as we mentioned in C. II. § IV. par. 8. the law considered in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. Yet promissory notes as-
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^c Barnard, Rep. 199.

^d Ld. Raym. 742.

sume the shape of bills of exchange only when indorsed; after indorsement the maker of the note is the first liable, and is as the acceptor of a bill of exchange, the indorsee as the payee, and the indorser as the drawer. The result of this is, that previous to suing the indorser the indorsee must make his demand on the maker of the note, and on his default the indorsee may have recourse to the indorser. Therefore in an action by the indorsee against the indorser, he must prove a demand made or due diligence used to make it on the maker, and notice of the maker's default; as shewn in C. VIII. § II. III.—As every indorser is as a drawer in respect of the indorsee, if the action be by the indorsee against the indorser, he is never called upon to prove the hand-writing of the maker; for the indorser is liable on his own indorsement, and that though the note was forged; as shewn in C. VII. § VI. par. 1. But in an action against the maker of a note by an indorsee, the plaintiff must prove the defendant's signature, and such indorsements through which he derives his title, and as are stated in his declaration, in which that of the payee must be stated; and stating that alone may be sufficient for the plaintiff to maintain his action, though there are other indorsements on the note; which if stated must be proved, if not stated must be struck out either at the time of trial or before; as heretofore shewn in § 1. par. 3.—In an action by an indorsee against the indorser his signature must be proved; but neither the hand of the maker, or any prior indorser to him against whom the action is brought is required to be proved; as heretofore mentioned concerning a bill of exchange in par. 3.—If the action be by the payee against the maker, the signature of the latter must be proved; likewise demand of payment made on him and his refusal to pay; or, due diligence used to make it.

6. THE signature of the party against whom the action is brought, may be proved by evidence of his having confessed the same; yet such evidence will not be sufficient when the action is against another party; as where the action is against the drawer, or acceptor of a bill, confession of an indorser that he indorsed it will not be sufficient proof of the indorsement; as in *Hemming v. Robinson*, where the action was by an indorsee against the drawer, the plaintiff proved the drawer's hand, and that when the note with the indorsement was shewn to the indorser, he acknowledged it was his hand-writing, but this was holden not sufficient to charge a third person*. But in *Dale v. Lubeck* where an

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* Law of Nisi Prius, 273.

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action was against the indorser, proof being offered that defendant had himself confessed that, he was come to town to hasten on the trial of an action that was brought against him upon an indorsement he had made on a bill of exchange; and the counsel said the very cause was brought down by proviso; so that it was strong evidence that it is for the same matter; the chief justice at the sittings at Guildhall allowed this to be good evidence of the indorsement^f. So in *Cooper v. Le Blanc*, the defendant was sued as indorser of a note; and it was proved that a discounteer sent the note to the defendant, who looked on it and said it was his hand, and the note (which had some months to run) would be paid when due. The chief Justice refused to let the defendant in to shew forgery by similitude of hands; since it would tend to destroy all negotiation of notes and bills. But he seemed inclined to allow proof of actual forgery, if the defendant could have shewn it, which he could not, and the plaintiff obtained a verdict^g.

WHERE there is a joint and several promissory note, the acknowledgement of one out of several drawers takes it out of the statute of limitations against the others, and may be given in evidence on a separate action against any of the others, as shewn in C. III. § VI. page 64. No. III.

7. IF a bill or note is made, accepted, or transferred, by a partner, or servant, the signature of the partner, or servant, which imports to have been made on the partnership or master's account, is as the signature of the partnership or master; as shewn in C. IV. § XI. C. VI. § VII. par. 1. and proof of such signature will be sufficient to bind the other partners or master. But if the signature be by a servant his authority must be proved. And it seems that subsequent assent to a servant's transaction is evidence of precedent authority^h; and that usual employ is evidence of such general authority, as will continue to bind the master till its determination be publickly knownⁱ.—A servant of Sir Robert Clayton and Mr. Alderman Morris (but at that time actually gone from their service) took up two hundred guineas of Mr. Monck, a goldsmith (who knew nothing of his being discharged) without any authority from his *quondam* masters, who refusing to satisfy Mr. Monck for the same, he brought an action against Sir Robert and Mr. Morris, and being tried at Guildhall, it was ruled *per Keeling* chief justice, that they should answer; and there was a verdict for the plaintiff. And though

^f Barnard. Rep. K. B. 199.

^g Str. 1051.

^h Comb. 450.

ⁱ 12 Mod. 346.

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there were great endeavours used to obtain a new trial, yet it was denied, the court at Westminster being fully satisfied that they ought to answer; for this servant had used often to receive and pay money for them; and they were obliged to comply, and paid the money^k.

§ III. AS concerning defence the defendant may set up to the plaintiff's action. The writ of inquiry. 1. When an action is commenced on a bill or note due attention should be had to the defence that may be made thereto; for if judgment is let go by default, defendant will not afterwards be permitted to object to the consideration; of which further mention will be presently made. The defence the defendant may set up, in general is the bad or illegal consideration on which the bill or note was obtained, or the total want of consideration. The former, will in some cases render the bill or note void in the hands of an indorsee, though in some cases no advantage can be taken of the consideration, but in an action between the original parties; as shewn in C. III. §. IV. where we have attended to the case in which a bill will be void by its date being altered after acceptance; and likewise to the case of a bill or note negotiated after become due.

WHEN a bill or note is transferred and passes into the hands of third persons who gave a valuable consideration for it, the transaction between the original parties cannot in an action be inquired into, except in the cases just now alluded to. Neither can any transferee who has received a consideration insist upon the want thereof. And though a note given by a wife to an husband is void, yet if indorsed over by the husband, as between him and the indorsee, it is good. So if the indorser had the note from an infant the original drawer. And where there is a negotiable note, and it comes into the hands of a third or fourth indorsee, though some of the former indorsers might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him, unless there should be some fraud or equity appearing against him in the case; as is likewise shewn in C. III. § IV. where, and also in C. VII. those points being discussed, it would be only a repetition to say any more here thereon.

AND now we shall proceed to treat on the writ of inquiry, where we shall have a demonstration of the effect of a defendant's suffering judgment to go against him by default, and in our fourth paragraph it will be seen that hereby, when sued on a bill of exchange, he admits that he is liable to that amount.

^k Beawes, 482. 4 Edit. *Monck v. in B. R. Cunningham's Law of Bills Clayton and Morris*, Mich. 22 Car. II. 140. n.

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2. As to the writ of inquiry, this is used where the judgment is incomplete, which judgment is commonly termed interlocutory, and usually is where the right of the plaintiff is established, but the *quantum* of damages sustained by him is not ascertained; which is a matter that cannot be done without the intervention of a jury. This interlocutory judgment happens where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration. By confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just. Or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete^a. But where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration, otherwise the entry of the judgment is, "That the plaintiff ought to recover his damages (indefinitely) but because the court knew not what damages the plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court."

THIS process is called a *writ of inquiry*, in the execution of which the sheriff sits as judge, and tries by a jury, subject nearly to the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess some *damages*, the sheriff returns the inquisition, which is entered upon the roll, in the manner of *a postea*; and thereupon it is considered that the plaintiff do recover the exact sum of the damages so assessed^b.

3. WITH respect to executing a writ of inquiry on a bill of exchange or promissory note. In *Bevis v. Lindsell*, Hil. 14 Geo. II. the court of King's Bench held, that on executing a writ of inquiry on judgment by default in *assumpsit* upon a promissory note, it was not necessary to produce the subscribing witness, for the note being set out in the declaration is admitted, and the only use of producing it is to see whether any money is endorsed to be paid upon it; it must therefore be proved to be his note, which may be by proving his hand^c.—In an anonymous case, Common Pleas, Hil. 11 Geo. III. By Justice Gould:

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^a See a description of action of debt in C. x. § 1. par. 1.

^b 3 Black. Com. 397.

^c Law of Nisi Prius, 278, Edit. 1785.

Upon a judgment by default in an action upon a promissory note, or a bill of exchange, the sum due thereon is admitted, and need not be proved upon the execution of a writ of inquiry^d.

It is said if there be judgment by default or confession, and the certainty of the demand appears upon record, the court may assess damages without awarding a writ of inquiry if they will. So if there be judgment for the plaintiff on demurrer. But where the demand is not certain upon the record, a writ of inquiry must issue, as in trespass. So in trespass on the case replevin, &c.^e

IN *Thelluson v. Fletcher*, Hil. 20 Geo. III. justice Buller observed, that writs of inquiry are often sued out in cases where they are not necessary, as, for instance, in actions of covenant for payment of a sum certain. He said it does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange, or promissory note, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained. Though even in cases where there is no necessity for a writ of inquiry that proceeding is of use, when the plaintiff goes for interest which the jury assesses in the name of damages^f.—The reporter of this case in a note, as with respect to nothing but the instrument is to be proved before the jury, says, “In such cases although the note or bill is stated, and the execution of it averred, in the declaration, it has been settled in many instances that, it must be produced before the inquiry jury.” Of which mention will again be made in the ensuing paragraph.

As to interest, this is due and may be ascertained on executing a writ of inquiry on all liquidated sums, from the instant the principal becomes due and payable, as on all bills of exchange. On notes of hand payable at a day certain; notes payable on demand after demand made. On money lent; and on an account stated. But not on goods sold and delivered they being usually upon credit, of three months, six months or indefinite: nor is the sum liquidated till the jury find the value^g. Of interest and damages the plaintiff will be entitled to on a bill of exchange, we treated in C. V. §. par. 3.

4. IN *Green v. Hearne*, Easter, 29 Geo. III. it was held that if defendant, who is sued as the acceptor of a bill of exchange suffer judgment by default, he admits that he is liable to the

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^d 3 Wils. 155.

^e Impey's King's Bench. Prac. 351.

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^f Doug. Rep. 315. 2 Edit.

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amount; and therefore though the bill must be produced on executing the writ of inquiry, it need not be proved. The only reason for producing the bill is to see whether or not any part of it has been paid. By justice Buller in delivering his opinion in this case: When a defendant suffers judgment to go by default, he admits the cause of action. And thus far an action on a bill of exchange, and an action for money had and received, are alike: but beyond that there is no similarity. For in the latter the defendant only admits something to be due; and, as the demand is uncertain, the plaintiff must prove the debt before the jury. But in the former, as the bill of exchange is set out on the record, the defendant by suffering judgment to go by default admits that he is liable to the amount of it^h.

IN *Rashleigh v. Salmon*, Trin. 29 Geo. III. where defendant let judgment go by default, in an action on a promissory note, the court of Common Pleas granted a rule for referring it to the prothonotary to ascertain the damages and costs, and calculate interest, without a writ of inquiryⁱ. So where there was judgment by default in an action on a bill of exchange, a rule was likewise granted for referring it to the prothonotary to ascertain the damages and calculate interest without a writ of inquiry^k. And where there was judgment by default in an action on a promissory note. After argument by counsel against making a rule absolute for referring it to one of the prothonotaries, to ascertain the damages and costs without a writ of inquiry. The court said that as the practice was clear in actions of debt, there seemed to be no good reason why it should not also prevail in actions of *assumpsit*, where the demand was precisely ascertained. In 3 Wils. 62. on a judgment by default in trespass, Wilmot, Ch. J. had gone so far as to hold, that the court might, if they pleased, themselves assess damages. In the present case, if there were any fact which it was necessary for a jury to determine, it ought to have been stated by affidavit. But as no such fact appeared, as the sum was defined on the face of the note, and as the interest was capable of exact computation by the prothonotary, it was highly reasonable to save the parties the expence of a writ of inquiry^l.

§ IV. AS concerning to whom the money is to be paid by the acceptor, and the satisfaction that may be had by suing on a bill or note. 1. The acceptor of a bill of exchange, is first

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^h 3 Durnf. & East, Rep. 301.

ⁱ *Longman v. Fenn*, Hil. 31 Geo. III.

^j 1 H. Black. Rep. 252.

^k 1 H. Black. Rep. 541.

^l *Andrews v. Blake*, Mich. 31 Geo.

III. 1 H. Black. Rep. 529.

first liable; for that he is charged by the acceptance, and the drawer only comes in aid of his default; and wherever therefore a bill of exchange is indorsed, the indorsee must first apply to the acceptor; and on his default recourse is to be had to the drawer; but in case of an indorsement, every indorser is as to his subsequent indorsee a new drawer, and may be sued on default made by the acceptor. A promissory note is considered by the law in the light of a bill drawn by a man upon himself and accepted at the time of drawing, but does not assume the shape of a bill of exchange till after indorsed, after which the maker is the first liable, and is as the acceptor of a bill of exchange, the indorsee as the payee, and the indorser as the drawer, which hath heretofore been demonstrated in various parts of our work; and hence it may be observed that if a bill be accepted the money is to be paid by the acceptor to him in whose favour the bill is drawn, or to the indorsee, in case it be indorsed over; and if there be several indorsers and indorsees, the last indorsee is entitled to the money. But the acceptor ought not to pay a bill till it becomes due; because till that time it is subject to a countermand by the drawer, and therefore if a countermand comes after drawee has paid the bill, the drawer is not answerable^m. If drawer pays the bill, acceptor is discharged; and if he pays after notice that drawer has paid it, action lies against him to recover the money so paid; as shewn hereafter in par. 8.

2. As to the satisfaction that may be had by suing on a bill or note, to the payment of which the drawer, acceptor, and indorsers are all liable; yet the party can have but one satisfaction, and until such satisfaction is actually had he may sue all or any of them; and accordingly it was adjudged in the Exchequer Chamber in *Claxton v. Swift*, Hil. 37. Car. II. where the case was, an indorsee sued the drawer and had judgment against him; and he likewise brought an action against the indorser, to which the indorser pleaded the judgment against the drawer. But the plea was held ill; for that the judgment was not satisfaction without which the party could not be barred of the remedy which he had against the other; and it is said the judgment was reversed, because there was not satisfaction; for the court were of opinion, that this case differs from the case of two trespassers, and is rather to be resembled to two debtors by a joint and several obligation, because by the custom the first drawer of the bill, and every indorser thereof, is liable to the payment

^m Molloy, 281.

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payment of a sum certain to the last indorsee, though the action be to recover by way of damages".

HENCE it is perceivable that obtaining a judgment against one party is no satisfaction against the other, and that where the holder of a bill sue only some of the persons liable, he may before satisfaction is obtained sue all or any of the others ;

AND he may sue a subsequent indorser, notwithstanding he has ineffectually taken in execution the body of a prior indorser and afterwards set him at liberty ; as in *Hayling v. Mullhall*, Mich. 19 Geo. III. where the prothonotary, to whom it was referred to state what was due on a bill of exchange for 23l. 10s. drawn by one Brushby, and payable to Sheridan or order, reported 2l. 19s. 7d. due for interest ; and 24l. 16s. 10d. for costs ; which with the principal amounted in the whole to 51l. 16s. 5d. This bill was indorsed by Sheridan, and afterwards by one Boon, and came into the hands of Hayling, who sued Boon and took him in execution, and afterwards let him out on a letter of licence, without paying the debt. He then sued Sheridan and held him to bail ; and of those bail Mullhall was one. Sheridan not paying the bill, Hayling brought a third action, against Mullhall the bail, who now by Adair his counsel, insisted that the debt was satisfied by the imprisonment of Boon. And Davy, counsel for the plaintiff, having argued on the contrary, the court delivered their separate opinions.

JUSTICE GOULD : I am clearly of opinion with the plaintiff. The holder has a right to sue all the indorsers, till the bill is satisfied. Each indorser is independent of the rest. JUSTICE BLACKSTONE : of the same opinion. The law so highly regards the liberty of the subject, that the taking his body in execution by a *Ca. Sa.* is with respect to him, a full satisfaction of the debt. But it only operates as a discharge to the identical person, so imprisoned : It does not discharge even his goods, after his death, by the statute Jas. I. the remedy still remains in force (after his death or discharge) against every other indorser, notwithstanding this ineffective *Ca. Sa.* in like manner as if the plaintiff had sued out an unproductive *Fi. fa.* against Boon. JUSTICE NARES : of the same opinion. Else two securities would not be better than one. Hereon (chief justice De Grey being absent) a rule was granted to stay proceedings against the defendant on payment of debt and costs^o.

IF the holder of a bill sue the acceptor and charge him in execution, and he is afterwards discharged by the Lord's act ; and the holder then sue the drawer ; the latter after paying the

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^a Lutw. 882. 3 New Abr. 607.

[•] 2 Black. Rep. 1235.

bill may again sue the acceptor and charge him in execution. As, where the plaintiff drew a bill of exchange for 20*l.* on the defendant, which the latter accepted; and which afterwards got into the hands of one Thompson; who recovered against the defendant, as acceptor, and charged him in execution. The defendant having obtained his discharge under the Lord's act in that suit, Thompson then sued the plaintiff as drawer, and recovered the amount of the bill; on which the plaintiff sued the defendant, on his acceptance, and charged him in execution. It was contended, on a rule to discharge the defendant out of custody, that he had satisfied the debt by being charged in execution at the suit of Thompson, and that he was not liable to be sued again for the same sum. But lord Kenyon, chief justice, said, nothing could be clearer than this was not a satisfaction of the debt as between these parties, though it was as to Thompson. That it was a mere formal satisfaction, even to the holder, not like actual payment. That this plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of Thompson, had a right to have recourse to this defendant as acceptor; for that, by his payment, a new cause of action arose against the defendant, which he might enforce without regard to what passed in the former action.—Justice Buller. The consequence of the defendant's not being liable in this action would be this, that, because the drawer was obliged to pay the holder of the bill, the acceptor would be discharged without paying either.—Rule discharged^p.

4. FROM hence it appears how the drawer, drawee, and indorser, of the bill are all liable to payment thereof. So he who accepts for honour of the drawer, treated of in the latter part of the eleventh section of our fourth chapter, is subject to the payment; and by such acceptance the person to whom the bill is payable hath his remedy both against such person as surety, and also against the principal; but the principal or original drawer is liable to him who thus subscribes for his honour^q; who may recover back the amount of the bill from the drawer in an action for money paid, laid out and expended^b.

5. THE holder of a bill or note may recover judgments in all the actions, yet he can only once recover the sum recoverable on account thereof, though he may take out execution for the costs in all^c. And where the plaintiff brought two actions upon a promissory note, one against the drawer and another

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^p *Macdonald v. Bovington*, Trin. 32 Geo. III. 4 Durnf. & East, Rep. 825.

^q 3 New Abr. 608.

^b 3 New Abr. 608. 1 Durnf. & East, Rep. 269.

^c 2 Vez. 115.

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against the indorser, and obtained judgments in both, and the money due on account of the principal in one, and the costs in both being tendered him, the court made an order to restrain him from taking out execution^d.—Though several judgments may be had, the party shall not levy more than one satisfaction for his debt, as shewn hereafter in § V. par. 1.

6. IF separate actions be brought against the acceptor and indorsers of a bill, the court will stay proceedings against any of the indorsers on payment of the bill and costs of that action, but not against the acceptor without payment of costs in all the actions. As where the first action was by the holder against the drawer of a bill, the second against one of the indorsers. There was also another action pending by the same plaintiff against another indorser, and a fourth against the acceptor, who had refused payment. A rule *nisi* was obtained on behalf of the drawer and indorser, why upon payment of the amount of the bill and the costs of these two actions all proceedings should not be staid against them.—The rule was opposed, on the ground that the costs of the other actions should also have been paid. But by the court, That is only necessary when the application for staying proceedings comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered^e.

7. AFTER a partial satisfaction, the holder must not in an action take a verdict for more than the sum remaining due. In *Pierston v. Dunlop*, Hil. 17 Geo. III. where the holder of a bill having received 180*l.* upon it from the drawer, sued and took a verdict for the whole sum against the acceptor, the court refused to discharge a rule *nisi* for a new trial, but upon the terms the plaintiff should remit the 180*l.* with interest from the time when it was paid, and defray the expence of a suit the defendant had instituted in the Exchequer for relief against the verdict^f.

8. IF the indorsee of a bill receive part of the contents from the drawer, he cannot recover more than the residue from the acceptor; and if the drawer pay the whole the acceptor is entirely discharged. *Assumpsit* by the indorsee of a bill of exchange against the acceptor. The bill was drawn for 95*l.* 10*s.* by one Seymour on the defendant, payable to his own order, by him indorsed to the plaintiff, and accepted by the defendant after it became due, Seymour the drawer paid the plaintiff 60*l.* 10*s.* as part of the contents; the defendant paid the residue

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^d Str. 515.^e *Smith v. Woodcock*, and against *Dudley*, Easter, 32 Geo. III. 4 Durnf. & East, Rep. 691.^f Cowp. Rep. 571.

with interest into court, and pleaded the general issue. The cause was tried before lord Loughborough, at Guildhall, at the sittings in Mich. Term, 29 Geo. III. and a verdict found for the defendant, with leave to move the court to enter a verdict for the plaintiff. Motion was accordingly made by Bond Serj. who contended that the payment by the drawer was not a discharge of the acceptor, he having by his acceptance made himself liable to the holder of the bill. The contract between the indorser of a bill and the indorsee was, he argued, totally different from that between the drawer and acceptor; the former being merely a contract of indemnity, but the latter, an undertaking that the acceptor has effects of the drawer in his hands to the amount of his acceptance, by which he gives currency to the bill, and makes himself liable for the whole. *Parminter v. Symons*, 4 Brown's Parl. Cas. 604. 1 Wils. 185. The payment of the drawer in the present case gave him a lien on the bill, for the sum he had paid; the holder also had a lien for the whole amount; but as a personal contract cannot be severed, and made the ground of two actions, the holder must bring the action for the whole, and be considered as a trustee for that part which the drawer had paid. *Johnson v. Kennion*, 2 Wils. 262. *Hawkins v. Cardy*, Ld. Raym. 360.—Wilson, J. mentioned the case of *Beck v. Robley* [in § 1. par. 4.], as being contrary to Bond's argument.

LORD LOUGHBOROUGH.—When a bill of exchange is drawn, the drawer orders the acceptor to pay so much of his money to a third person; but if he anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking; so that if the acceptor were to pay the bill after notice given him that the drawer had already paid it, an action would lie for the drawer against the acceptor to recover back the money so paid. Another reason which weighs much with me is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if after a bill had been taken up by a drawer, the acceptor should be liable to be called upon for payment. Gould, J.—The doctrine contended for would go the length of proving, that the holder of a bill having received the whole money from the drawer, might recover it again from the acceptor^g.

9. WHERE the drawer of a note was sued by the indorsee, and the bail for the drawer paid the debt and costs, it was held this

^g *Bacon v. Searles*, Mich. 29 Geo. III. 1 H. Black. Rep. 88.

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this absolutely discharged the indorser as much as if the drawer himself had paid it. The case was, S. drew a note, by which he promised to pay to P. or order, the sum of 200l. P. indorsed it to H. H. brought an action against S. in which he held him to special bail, and recovered interlocutory judgment against him, on which his bail paid the debt and costs, amounting to 220l. 15s. H. executed an instrument between himself on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it against S. that the bail had purchased the note, and paid the debt and costs, in consideration of which H. assigned over to them the note and the interlocutory judgment, with a power of attorney to make use of H's name to sue the indorser, and covenanted in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in H's name against P. the indorser, on which these circumstances were stated, and the court held the indorser was discharged by the payment by the bail in the former action, as much as if the drawer had paid the money himself^b.

10. If the indorser of a bill of exchange becomes bankrupt, and the holder proves the amount of his bill under his commission, and afterwards compounds it and discharges the acceptor without notice to the assignees of the indorser, he thereby also discharges the indorser's estate, and the proof of his debt must be expunged; as shewn at large hereafter in § V. par. 2.

11. As to interest which the holder of a bill is entitled to; this we have heretofore treated on in C. V. § 1. par. 3. and there mentioned, that the neglect of procuring a protest on a bill whereon it ought to have been made, will preclude the holder from recovering interest or expences from such persons as should have notice of non-acceptance or non-payment. Yet it should be observed that the costs mentioned to be given by the protest are not costs of suit but other expences incurred: for where the suit may be without protest, costs of suit^c are of course given.—As with respect to interest and expences recoverable by the holder, there is some difference between foreign and inland bills; as that on the former re-exchange forms part of the expence: we shall now proceed with describing re-exchange, and afterwards relate a late determined case concerning what interest and expences are recoverable.

RE-EXCHANGE, says Mr. Gordon^k, was undoubtedly at first claimed in the name of damages upon bills returned with protest,

^b *Hull v. Pitfield*, Hil. 17 Geo. II. 1 Wils. 48.

^c Costs of suit are generally given the party who has a verdict, in actions of debt and *assumpsit*, hereafter treated on in C. X. § 1. par. 1; but not in all actions. For the particulars of which see Tidd's Law of Costs, lately published.

^k Universal Accountant, 2 V. 367.

protest, and may still be considered in that light in those places in which bills cannot readily be passed. But in its proper acceptance, re-exchange must be considered as the difference of the price of exchange where a bill was remitted, and the place where it was drawn, when the value of a drawn or remitted sum is re-drawn. And Mr. Stevenson says, re-exchange according to the laws of exchange cannot be demanded but when the nature of it is such, that the equivalent is re-drawn by the bearer of the bill, at the place where it was protested, upon the remitter or indorser, at the place where it was first drawn; and the difference in the course of exchange back makes the re-exchange, which is always to the disadvantage of the drawer; as for example.

SUPPOSE I am engaged for the honour of my correspondent in Holland, to pay 100l. sterling upon a particular day, and he, in order to furnish me with a particular fund for that purpose, hath remitted me a bill of exchange, which I am to receive payment of that same day, or perhaps a day or two sooner, (which is generally so ordered in such cases); but the acceptor failing to pay it to me, and I having no fund to pay the 100l. sterling for account of my friend, am obliged to return the bill remitted to me by him with protest, and to re-draw upon him for the value of the 100l. which I receive here in order to pay what I had engaged for on his account: and this is the only way to save my own credit, as well as that of my correspondent.—Now, I suppose my friend in Holland purchased that bill at the rate of one gilder in Holland, for two shillings sterling to be paid here, so that the 100l. sterling cost him 1000 guilders: but, when I draw upon him for the value of 100l. I receive only twenty-two pence for every gilder to be paid in Holland; so that I must draw upon him for 1090 guilders 18 stivers, which is 90 guilders 18 stivers, that is, above 9l. *per cent.* more than he paid to the person who furnished him the bill on this place, and is the re-exchange, which he may justly charge him with upon the bill's being returned duly protested¹.

It is observable with respect to re-exchange, that they who deal largely in bills of exchange are extremely careful to have proper intelligence of the course of exchange, to and from the different places with which they correspond every post day; and it is reckoned an omission in a correspondent, to neglect advising of this particular at the place of their residence at the bottom of his letter^m.

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¹ Stevenson on Bills of Exch. 53, 55. ^m Gordon, 2 V. 367.

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THUS having attended to the description given by those two writers of re-exchange, before we proceed, as proposed, with the late determined case, we shall relate what is said by Mr. Beawes on this head; which is, that the exchange is reckoned according to the course at sight at that time and place where the protest is made, to the place where the payment should be made by the drawer; but if it is not complied with there, then the sum is again increased, by the commission and postage being added, and the course is now reckoned upon the whole sum, according as it shall govern at that time and place upon sight, to the place where the bill is to be paid, and the acceptor is obliged to pay the re-exchange and all the charges, although the parcel was not effectually negotiated and redrawn, i. e. re-exchange, provision, and postage, must be twice paid, &c. as provision twice for the exchange and re-exchange; the charges being only for postage, and protests, unless the acceptor (by delays and excuses) forces the possessor upon some necessary charges to recover, which the acceptor is obliged to pay; but no extraordinary ones, such as travelling, &c. will be allowed.—And if the acceptor under the aforementioned circumstances refuses immediate payment to the returned bill, a legal interest may be charged him, from the day that the bill was due to the time of its discharge; though he shall not be obliged to make good any other loss or damage than those before mentioned, notwithstanding the expressions used in the protest, as these are not to be construed as obligatory on the acceptor to satisfy any loss or damage which the possessor may pretend he has suffered from a want of punctual payment, and by this means frustrating his designs of some beneficial engagement, or a loss of a convenient opportunity for advantageously employing the sum detainedⁿ.

12. WITH respect to what interest and expences are recoverable. In *Auriol v. Thomas*, King's Bench, Trin. 27 Geo. III. it was held that where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental charges, beyond the amount of 5l. *per cent.* if such charges are reasonable, warranted by usage, and not made a colour for usury. That the charge of 10s. *per pagoda* on a bill returned protested from India is not excessive, though it was taken in payment here at the rate of 6s. and 6d. *per pagoda*.—The case is reported as follows:

ON a motion to set aside a writ of inquiry for excessive damages, it appeared that the plaintiffs were the indorsees of a bill of exchange drawn here by G. Campbell for 2800 *star pagodas*, payable to the defendant or order, and directed to G. Mowbray,

G. Mowbray, Esq. at Madras: The plaintiffs discounted the bill, giving the then current price of the exchange, which was 6s. 6d. *per* pagoda. They sent it to Madras, from whence it was returned to England, protested for non-acceptance and also for non-payment; on which the plaintiffs had demanded and recovered at the rate of 10s. *per* pagoda, and 5l. *per cent.* from the expiration of thirty days after notice to the defendant of it being returned.

WOOD defendant's counsel shewed cause, and contended that this could not be considered as an usurious demand, because the usage as well as the particular agreement of the defendant had been proved before the jury to charge at the rate of 10s. *per* pagoda for bills returned from India protested, and 5l. *per cent.* after thirty days notice to the defendant of non-payment, which included all incidental charges.

PHILIPS in support of the rule, cited the case of *Benson v. Parry* [summer assizes at Hereford, 1780], where it had been held to be usury for country bankers to take more than 5l. *per cent.* on inland bills payable at another place. And if the practice be contrary to law, no usage could make it good.

JUSTICE BULLER: The case of *Benson v. Parry* at Hereford was determined on a mistake, but when it was more maturely considered by this court on a motion for a new trial, they were unanimously of opinion that extra charges might be allowed though they amounted to more than 5l. *per cent.* if they were fair and reasonable, and not as a colour for usury; and there a new trial was granted. This doctrine was again recognized in two *Nisi Prius* cases, the one before the Lord Chief Baron Eyre, on the circuit; the other before me at the sittings at Westminster [related in C. VII. § VI. par. 2]. So that it is now clearly settled that the party is entitled to take not only 5l. *per cent.* for legal interest, but also a reasonable sum for remitting and other necessary incidental expences. The demand in the present case arises upon a bill of exchange payable in India, which if not paid there when due, would carry the interest allowed in that country; and it is admitted that the constant course with respect to bills returned protested from India has been to allow at the rate of 10s. *per* pagoda, which includes interest, exchange, and all other charges. There cannot therefore be any colour for saying that this transaction is usurious.

JUSTICE GROSE: The same doctrine has been confirmed in the court of Common Pleas. And the line which has been taken is, that if the sum charged be not a colour or a screen for usury, but is only fair and reasonable, it ought to be allowed.

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allowed. This is like the case some few years ago where Indian interest was allowed here on a bond given in India.—The rule discharged °.

§ V. AS concerning satisfaction that may be had by proving bills and notes under a commission of bankruptcy. 1. By statute 7 Geo. I. c. 31. Every person who shall give credit on bills, bonds, promissory notes, or other securities, to any person who shall become bankrupt upon a good and valuable consideration *bona fide* for any sum of money or other matter or thing whatsoever, which shall not be due or payable at or before the time of such person's becoming bankrupt, shall be permitted to prove his bills, bonds, notes, or other securities, in like manner as if they were made payable presently, and not at a future day; and shall be entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate in proportion to the other creditors of such bankrupt's, deducting only thereout a rebate of interest, and discounting such securities payable at future times, after the rate of five pounds *per centum per annum*, for what he shall so receive, to be computed from the actual payment thereof to the time such debt should or would have become due and payable in and by such securities as aforesaid. And the bankrupt shall be discharged from such securities, as if such money had been due and payable before the time of his becoming bankrupt.

THIS statute it is held extends generally to all personal securities for a valuable consideration, where the time of payment is certain though postponed to a future day¹. But where the time of payment is uncertain it is otherwise; as contingent debts cannot be proved under the statute, and where there was a collateral undertaking by A. to pay a note if H. did not, it was held the demand could not be proved under a commission of bankruptcy against A.; but if it had been an engagement by A. to pay at all events, without regard to H. that then it would be a debt that might be proved under A's commission². —Of bills and notes made payable on contingency we treated in C. II. § II. and in our third section of this chapter on the defence the defendant may set up to an action brought on a bill or note; from whence may be perceived various circumstances under which bills and notes will not be admitted to be proved; and hereafter in par. 3, 4, 5, 6. we shall treat on the considerations on which the holder will be allowed to prove the same; and

° 2 Durnf. & East, Rep. 52.

¹ Cowper, 460.

² Cowper, 543. 2 Ld. Raym. 1546.

and then relate a very late determined case, wherein is shewn some other circumstances under which a bill may not be proved under a commission. In par. 7. treat on the interest allowed under a commission. In par. 8. on proving the costs and charges. And here proceed to shew how the holder may prove where the bill or note is unexceptionable,

As that the holder of a bill of exchange is entitled to prove his debt under a commission against the drawer, acceptor, and indorser, and to receive a dividend from each upon his whole debt, provided he does not in the whole receive more than twenty shillings in the pound. But there is a distinction in this case, where the creditor applies to prove his debt, after having received a part, and where he applies previous to having received any payment or composition; for if the creditor at the time of proving has received any part of the bill, he can only prove for so much as remains; but if after having proved for the whole, he receives a part of the bill from any of the persons liable to pay it, he is entitled to a dividend upon the whole, provided it does not exceed twenty shillings in the pound upon such part as remains due^r. As, where the petition was to the lord chancellor *ex parte* Wildman, 1750. The petitioner was creditor of the bankrupt, who had given him bills of exchange on *Vanvillen*, and others in Holland, who made themselves liable by accepting them, and afterwards failed and compounded with their creditors. Wildman the petitioner was admitted a creditor under the commission for his whole debt. But before a dividend, he received a composition of 2s. 6d. in the pound from the acceptors of the bills.—Upon a question, whether Wildman should receive a dividend upon his whole debt, or only upon what should be due after deducting the 2s. 6d. in the pound received by him?

LORD HARDWICKE said, the creditor had two personal securities. That in common cases abstracted from the cases of bankrupts, if there are several obligors, the obligee may have several actions against them all, several judgments and several executions; but he shall not levy more than one satisfaction for his debt, if he does, courts of law will relieve. The same in bills of exchange, actions, &c. lie against drawer and all the indorsers, but only one satisfaction for the debt, [as heretofore mentioned in § IV. par. 25.]. So under commission of bankruptcy, the creditor is entitled to come under the commission against all the obligors, drawers, &c. and this is not a preference given to such creditor, but a benefit he is entitled to at law, upon all his securities, till he is completely satisfied. His lordship observed, that to say Wildman should only be paid

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^r Cooke. 196. 2 Edit. cites *Cooper v. Pepys*, 1 Atk. 107.

a dividend on the sum left, after deducting what he had received, would be taking away from a man the double security he had, and which he may use in law and equity, till he is satisfied his whole debt. And as in this case the composition was not paid till after the debt proved, he shall receive a dividend on the whole debt, and shall account hereafter for what he has received, or shall receive on the bills of exchange; and this will not be any prejudice to the estate, for if he receives more from those bills of exchange than will answer twenty shillings in the pound, he shall account to the assignees for such surplus. And his lordship observed, this case differed from [*Cooper v. Pepys*, [above cited]] because the creditor there had received the benefit before he attempted to prove his debt against the indorsee under the commission^a.—If the holder of a bill after proving his debt under a commission of bankruptcy against an indorser, compound with the acceptor, and thereby discharges him from the action the assignees would otherwise have against him, the holder's debt proved under the commission must be expunged, as demonstrated in the following paragraph.

2. IN a petition *Ex parte* Smith, November 5th, 1789, it was prayed that a debt proved by Sir James Esdaile and Co. under the commission against Lewis and Potter, on certain notes and bills, which had been indorsed by the bankrupts, might be expunged, on account of the holders having, since the proof of the debt, discharged the acceptors of the bills and drawers of the notes, without notice to the indorsers or their assignees. The first note which was included in the prayer of this petition, was a promissory note made by Barber to Powell, and indorsed by Powell to Lewis and Potter, who having occasion to discount it, indorsed it to Esdaile and Co. Lewis and Potter became bankrupts before the note became due. The note not being honoured when it fell due, Sir James Esdaile and Co. proved the amount in June 1788, under the commission against Lewis and Potter; after which they proceeded at law against Barber and Powell, to judgment, and then, there having been a proposition on the part of Barber to pay 15s. in the pound to all his creditors, in full discharge of their debts. Esdaile and Co. accepted the same, and gave a full discharge to Barber for the amount of this note, without the consent or privity of the assignees of Lewis and Potter.

AGAINST the petition it was said, that the rule which prevailed where the drawer or indorsers were solvent, could not prevail where the indorser was a bankrupt.—Where the indorser is a bankrupt, as in the present case, notice cannot be necessary,

^a 1 Atk. 109. Cooke, 197. 2 Edit.

necessary,—The general rule as between solvent persons, ought not to apply generally, where the party to whom notice was expected to be given was bankrupt.

LORD CHANCELLOR. I have before decided that the doctrine of notice, which holds amongst solvent persons, does not apply as between bankrupt estates: but, here, the indorser only was bankrupt, the maker and the payer of the note were not. The debt, proved by Sir James Esdaile, was undoubtedly well proved at the time, and the question is whether the subsequent conduct of the creditor has destroyed that interest which he acquired by such proof. By the composition which he has made with the drawer of the note, which goes to the length of discharging of the drawer, he, certainly, has prevented the assignee of the indorser from coming on the drawer of the note for payment of what his estate shall pay in consequence of the proof; and yet, on the other hand, it does seem a strong thing to say that where there are many names on a bill, one of whom is insolvent, though not a bankrupt, and the other a bankrupt, and the holder proves under all the commissions, and then makes a composition *bona fide* with the insolvent person, and obtains from him all that he possibly can, that he shall, thereby, be deprived of the benefit of all the provision made by him under the commissions against the other parties who stood on the bill posterior to the party compounded with. And I am well satisfied, in this case, Sir James Esdaile did in fact, make the best terms he could with the drawer of the note by taking 15s. in the pound of him in full. And whatever difficulty I may find in making a precedent which allowed of such a composition, without giving notice to the assignees of the indorser, I am convinced that the justice of this particular case, if it stood alone, would not require me to expunge this debt. The case made does not impute any fraud to the transaction of this composition; but, on the contrary, the holders used all their diligence at law against the drawer of the note and the payer, and then made the best terms they could with the acceptor; though, at the same time, they have gone to the extent of acquitting him altogether in respect of the note. However, whatever may be the circumstances of the present case; I think, in point of precedent, it may be dangerous to say, that after such an acquittal, the holder may resort to the indorser's estate. It is, certainly, open to this sort of fraud, that when the holder sees that, in one way or other, he is sure of his 20s. in the pound, he may favor an acceptor, at the expence of an indorser, by compounding with the acceptor for just so much as he conceives will be the deficiency under the indorser's commission.

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In this view it may be a dangerous precedent; and I cure this danger by saying, generally, that the holder of paper shall not compound with the prior names on the bill, but with the consent of the assignees of the posterior party. And it is not an answer to say, that if any fraud is practised in the composition, that shall take it out of the general rule. It is much better, and more convenient in practice, to have a precise rule to go by; and justice will, in general, be better done to all parties. It is not that notice is strictly necessary; but I go upon this, the debt is well proved against the indorser's estate, this gives his assignees a right of action against the acceptor, or drawer, for the amount paid out of the indorser's estate: but this right is cut away by the composition and discharge given to the acceptor by the holder.—Therefore it is better to say, let the assignees either take the whole, or permit the holder to make the most of it he can against the acceptor. I think therefore the debt must be expunged.

A FEW days afterwards this case was mentioned again; when his lordship said, he had considered it a good deal, and had conversed on the subject with some of the judges, and he was satisfied that the holder must get the consent of the assignees of the indorser before they can discharge the acceptor without discharging the indorser's estate at the same time^b.

3. IF a bill of exchange or promissory note is drawn by way of accommodation, the party holding it for a valuable consideration is entitled to prove to the whole extent of the bill or note, and receive the dividends, provided they do not amount to more than twenty shillings in the pound on the consideration which he gave^c.

4. THE liability to pay money is a good consideration for a bill of exchange, and will entitle the party to prove it; as it is held that if a person gives an absolute bond to another who became surety for him, or who accepted bills of exchange drawn upon him by the obligor not having effects in his hands to answer them, it is a good consideration for the bond, and he is entitled to prove it as a debt under the commission, although he has not himself paid the money at the time^d.

5. IF a man agree to lend his acceptance to another, provided he will find a surety to become bound that the money shall be furnished to pay it, and the borrower and the surety give their joint and several note of hand for this purpose;

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^b 3 Bro. Cha. Rep. 1.

^c Cooke, 203. 2 Edit.

^d *Toussaint v. Martinnant*, Mich. 28

Geo. III. 2 Durnf. & East. Rep.

108. Cooke, 191. 2 Edit.

if the borrower and the surety become bankrupts, the acceptor shall be allowed to prove this note of hand under their several estates, although the commission issued prior to the acceptance becoming due, or to the time when the bankrupts, by their note of hand, had promised to pay the money; for the liability to pay money is a good consideration for a bill of exchange, and will entitle the party to prove it, although the payment is to be made in future or depends on a contingency^c. And where *Mitchel* and *Cleeter* borrowed a promissory note for four hundred pounds of *Benjamin Beaufoy*, for which they gave him an accountable receipt, promising to refund the said four hundred pounds to him on demand, and placed the same in the hands of *Marlar*, *Pell*, and *Down*, as a collateral security for their accepting the drafts of *Mitchel* and *Cleeter*, without effects to the same amount; *Beaufoy* being called upon by *Marlar* and *Co.* to pay this money, gave them his bond for the amount, and thereby took up his note thus deposited with them, payable to and indorsed by *Mitchel* and *Cleeter*. Afterwards *Mitchel* and *Cleeter* became bankrupts; and *Beaufoy*, on application to the Chancellor, was allowed to prove the promissory note from *Mitchel* and *Cleeter* to him^f.

6. If the indorser of a bill is compelled to pay it on account of the failure of the acceptor, he may prove upon the bill under the commission against the acceptor, although he did not take it up till after the commission issued; as where *Span*, of Bristol, was in the habit of discounting bills of exchange for *Scott* and *Pearson*, of London. *Scott* and *Pearson* procured one *Forfith* to draw bills upon one *Wilkins*, payable sometimes to the order of *Span*, and sometimes to the order of *Forfith*; a set of which bills *Scott* and *Pearson* sent, without any indorsement by them, to *Span*, and received the value of them in Bristol Bank bills. Before the bills of exchange became due, both *Forfith* the drawer and *Wilkins* the acceptor failed, and *Span*, as the indorser, was obliged, after the commissions issued against *Forfith* and *Wilkins*, to take them up. And the Lord Chancellor considered it as a very clear point that a bill of exchange negotiated after the bankruptcy of the acceptor, might be proved under his commission, although the party were not possessed of it at the time of the bankruptcy, for the debt accrued by the acceptance; and that as in this case *Span* had paid a consideration for these bills, though not to the bankrupt, and had become the holder of them in a fair manner, he was entitled to prove them under the commission^g.

^c *Ex parte* Maydwell, April 1785.

Cook, 204. 2 Edit.

^f *Ex Parte* Beaufoy, 22d January

1787. Cooke, 205. 2 Edit.

^g *Ex parte* Brymer, 30 May, 1788.

Cooke, 211. 2 Edit.

^h *Howis*

IN a very late case, wherein the four last above cited cases are particularly attended to, it is held that, if payee of a promissory note pay the amount of it to an indorsee after the bankruptcy of the maker, he may recover against the maker notwithstanding his bankruptcy and certificate; as that the payee had no property in the debt which he could have proved at the time of the bankruptcy^h. The case was as follows: The plaintiff, who was payee and indorser of two promissory notes, brought an action against the defendant as maker; who pleaded, *inter alia*, his bankruptcy and certificate in bar. It appeared that these notes had been delivered by the defendant before his bankruptcy to one Green with the indorsement of Howis upon them. After the bankruptcy Green sued Howis as indorser, and recovered against him; who now brought this action. On this evidence lord Kenyon was of opinion at the trial that the certificate was no bar; and a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit if the court should be of a different opinion; which motion was made by *Ruffel*; who contended that this debt existed before the bankruptcy, and consequently was barred by the certificate. The money being paid by the plaintiff after the bankruptcy makes no difference; the debt existed before, on account of the liability. As in the case of the surety [in par. 4.] who became bound with his principal for payment of money by instalments, and took a bond from him conditioned for the payment of the amount of the instalments, before the first of them became due. The principal becoming bankrupt before that time, and obtaining his certificate, the surety was held to be thereby barred, though he had not paid the money to the original obligee till after the bankruptcy, and consequently had not been damnified till that time. This very point however appears to have been already decided; first in the case *ex parte Maydwell*, [in par. 5.] where an acceptor of a bill of exchange, whose acceptance was not due, and who did not pay, till after the bankruptcies of the drawer and of another person who had given a note to Maydwell by way of collateral security, was permitted to prove under the commission against the surety, though that note had not become due till after his bankruptcy. There too, it might have been urged that, as the money was not paid, the debt was not due, before the bankruptcy; yet inasmuch as the acceptor was liable to pay the money upon an obligation entered into before the bankruptcy, it was held provable as a debt under the commission. This case is still stronger than that, for the plaintiff being payee as well as indorser of the note, it necessarily presupposed an existing debt before the

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bankruptcy.

^h *Howis v. Wiggins*, Trin. 32 Geo. III. 4 Durnf. & East, Rep. 714.

bankruptcy. Then came the case of Brymer, [in par. 6.] which was twice argued before the Chancellor, and not only confirms the determination in the former case as far as it goes but is a complete answer to the only remaining objection which could be urged, namely, that these notes were not in the plaintiff's hands at the time of the bankruptcy. For in that case of Brymer, the indorser of a bill who was obliged to pay it after the bankruptcy of the acceptor, as the indorser did here after the bankruptcy of the maker, was permitted to come in under his commission. Now the acceptor of a bill of exchange and the maker of a promissory note have ever been considered as standing in the same situation in point of law. And in reason the two cases are precisely the same with respect to this point. But,

THE court said that this was distinguishable from the case cited, because here the plaintiff had no legal security for a debt which he could have proved at the time of the bankruptcy but that the property in the bill then belonged to another person; and that his subsequent act of paying the amount of the note to the indorsee was not referable to any time antecedent to the bankruptcy, so as to enable him to prove the debt under the commission. But that, when the plaintiff paid the bill, a new cause of action arose against the drawer, for at the time of the bankruptcy this plaintiff had no demand against the bankrupt. That the plaintiff could not have been the petitioning creditor, because he had not paid the money at the time of the bankruptcy. And that in *Vanderheyden v. De Pauw* [3 Wils. 528.] where A. accepted a bill drawn on him by B. which B. promised to pay and gave A. a note to save him harmless, and B. became a bankrupt before the bill became due, was held that A. who was afterwards obliged to pay the bill could not come in under B's commission.—Rule refused. The reporter in a note at the conclusion of this case says, See also *Chilton v. Whiffin*, 3 Wils. 13. *Goddard v. Vanderheyden*, 262; and *Ex parte Adney*, Cowp. 460.

7. As to interest allowed under a commission of bankruptcy. After a man becomes a bankrupt, commissioners compute interest upon debts no lower than the date of the commission but although the usual rule is, that all interest on debts coming in interest shall cease from the time of issuing the commission yet in case of a surplus left after payment of every debt, the interest shall again revive, and be chargeable on the bankrupt or his representatives. As to notes and bills the commissioners

¹ *Ibid.* 715.

² 1 Atkins, 244. In case of a surplus interest will be allowed where,

by the course of trading it was allowed, 3 Bro. Cha. Rep. 436.

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do not allow creditors to prove interest upon those unless it is expressed in the body of them. And this rule was approved by lord Hardwicke, who said even at law where notes are for value received, and interest is not expressed, the jury do not give the plaintiff, in an action upon the notes, interest for them but by way of damages only. But the creditor may prove the full sum for which the notes were given, notwithstanding he received 5l. *per cent.* discount¹. So it is presumed he may notwithstanding he has taken not only 5l. *per cent.* discount, but also 5s. *per cent.* on the gross sum, treated on heretofore in IV. par. 12.

8. WITH respect to proving the costs and charges accrued or incurred by a bill of exchange. In an *anonymous* petition to the lord Chancellor 1754, where the question was, whether the costs and charges accrued by the protesting bills after a commission of bankruptcy issued, can be proved? his lordship ordered, that the costs of the protests arisen before the commission should be proved by the petitioners, but no part of the costs arisen afterwards^m.

IN *Aylett v. Harford*, Trin. 19 Geo. III. On a motion to set aside execution sued out against bail, in an action which had been brought on a promissory note for 100l. The court of Common Pleas held, that a creditor who obtains a verdict before commission against a bankrupt, is entitled to prove his *costs* as well as his *debt* under the commission, though judgment was not signed till after the commission issued.—The plaintiff in this case having proved his debt under a commission of bankruptcy, the commissioners refused to let him prove the costs, which were taxed at 30l. because judgment was signed subsequent to the commission. But by chief justice De Grey: The commissioners were mistaken in not suffering plaintiff to prove his costs. The verdict was found before the commission issued, and 40s. costs; and the costs *de incremento* [of increase], when taxed, are annexed to these and become consolidated by a fair and equitable relation of lawⁿ. And in conformity to this decision in *Langford v. Ellis*, East. Term 1785, in King's Bench. By the court: The cause of action exists before the verdict, where a verdict is obtained the damages are known and become a debt, and the judgment when given, relates back to the time when the plaintiff obtained his verdict.

IN *Ex parte*, Moore in the matter of Tyler, 1789, it was determined, that where the date of an act of bankruptcy is ascertained, costs arising from the protest of bills of exchange shall

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shall

¹ 1 Atkins, 150. Cooke, 213. 2 Edit. surplus being of the bankrupt's estate, interest was allowed to be proved on his notes to bankers, not reserving

interest. *Ex parte* Hankey, 1793.

³ Bro. Cha. Rep. 504.

^m 1 Atkins, 140.

ⁿ 2 Black. Rep. 1317.

shall not be proved under the commission *only* when incurred antecedent to the act of bankruptcy, and not merely because they were incurred previous to the issuing of the commission^o.

§ VI. AS to the nature and effect of bank notes. 1. The nature of bank notes is different from that of bills of exchange and notes ordained by statute 3 & 4 Ann. as hinted in C. II. § IV. par 1. and in the case of *Miller v. Race*, King's Bench, Hil. 31 Geo. II. the nature and effects hereof are described. In this case an action of trover was brought against the defendant, on a bank note, for the payment of 21l. 10s. to one William Fenny, or bearer, on demand. The cause was tried before lord Mansfield, at the sittings at Guildhall, London; and upon the trial it appeared that William Fenny being possessed of this bank note, on the 11th of December 1756, sent it by the general post, under cover; that on the same night the mail was robbed, and the bank note in question (amongst other notes) taken and carried away by the robber; that this bank note on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual way of his business, and without any notice or knowledge of its being taken out of the mail.—It appeared that Mr. Fenny having notice of this robbery, on the 13th of December, applied to the bank of England to stop the payment of this note; which was ordered accordingly, upon Mr. Fenny's entering into proper security to indemnify the bank.—Some little time after this the plaintiff applied to the bank for payment of this note; and, for that purpose delivered the note to the defendant, who is clerk in the bank: But the defendant refused either to pay the note, or to deliver it to the plaintiff. Upon which this action was brought against the defendant.—The jury found a verdict for the plaintiff, and the sum of 21l. 10s. damages; subject nevertheless to the opinion of the court upon this question, *viz.* Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank note to entitle him to recover in the present action?

AFTER arguments by counsel on each side, lord Mansfield delivered the resolution of the court to the following effect. Bank notes are not goods, nor securities, nor documents for debts nor are so esteemed; but are considered as money, as cash in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is

^o 2 Brown's Cha. Rep. 597.

used in common payments as money or cash. They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. On payment of them, wherever a receipt is required, the receipts are always given as for money; not as securities or notes. So, on bankruptcies, they cannot be followed as identical and distinguished from money; but are always considered as money or cash.—In case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration: but before money has passed in currency an action may be brought for the money itself.—An action may lie against the finder of a bank note; but not after it has been paid away in currency. And this point has been determined, even in the infancy of bank notes, for 1 Salk. 126. M. 10 W. III. at *Nisi Prius*, is in point; and lord chief justice Holt there says, that it is by reason of the course of trade, which creates a property in the assignee or bearer.—An innkeeper took the present note, *bona fide*, in his business, from a person who had the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber; for this matter was strictly inquired and examined into at the trial, and is so stated in the case, that he took it for a full and valuable consideration, in the usual course of business. Indeed if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1000l. it might have been suspicious: But this was a small note for 21l. 10s. only, and money given in exchange for it. No dispute ought to be made with the bearer of a cash note, in regard to commerce, and for the sake of the credit of those notes; though it be both reasonable and customary to stay the payment till inquiry can be made, whether the bearer of the note came by it fairly or not.—The whole court being unanimous, the *postea* was ordered to be delivered to the plaintiff^p.

2. BANK notes payable after sight, are to be presented at the bank, on which the day of their being presented is marked; and on the day next ensuing, the time of their running commences, and at the expiration thereof the same are to be paid, no days of grace being required, as there are on bills of exchange.

§ VII. AS concerning the privilege of attornies. Persons privileged from arrest. 1. The privilege of attornies being very numerous, entering into a detail thereof would be

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foreign

foreign to the intent of this work ; wherefore we shall only drop some hints relative thereto, and proceed to treat on persons privileged from arrest. Attornies (being officers of the court wherein admitted and always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by bill (called usually a bill of privilege) as being personally present in court. And if an attorney is sued by original as acceptor of a bill of exchange, he may plead his privilege in abatement in such case, as well as in any other personal action^a. This bill of privilege is nearly like a declaration against any other person, and the proceedings thereon very nearly the same as the proceedings against others, and if judgment is hereby obtained the attorney may be taken in custody and imprisoned ; but if he is arrested at the commencement of the suit the action will be set aside by his pleading in abatement. If an attorney is arrested in a superior court, he cannot have his writ of privilege, but must plead it in abatement, but if he is arrested in an inferior court, he may have his writ and be discharged^b.

2. PERSONS privileged from arrest, as peers of the realm, peeresses, and members of parliament, are not to be arrested for any debt, whether it be due on a *bill of exchange, promissory note, or otherwise*. So officers of the law courts, particularly those belonging to the court of King's Bench, the proceedings against them are much alike to the proceedings against attornies, and if judgment is obtained against them, they may be taken into custody and imprisoned. But peers, peeresses, and members of parliament, are not to be arrested or imprisoned for debt ; for obtaining which the usual method of proceeding against them is by summons and distress infinite.

By statute 7 Anne, c. 12. " All process whereby the person of any ambassador, public minister of a foreign prince or state, authorised and received as such, or the domestic servant of such, may be arrested or imprisoned, or their goods and chattels distrained, seized, or attached, shall be deemed and adjudged to be *utterly null and void*." Upon which it has been adjudged that one claiming protection under this act as a domestic servant, must *really and bona fide* be a servant of an ambassador, &c. and serve him in that capacity^c.

3. HEIRS, executors, or administrators, are not to be arrested for debts of the deceased, as the action is not so properly
against

^a *Comerford v. Price*, Hil. 20 Geo. III.
Doug. Rep. 312. 2 Edit.

^b 2 Black. Rep. 1085.

^c 3 Wils. 33.

against them in person, as against the effects of the deceased in their possession. But they may be arrested for a devastavit, or wasting the goods of the deceased; that wrong being of their committing.

AND there are certain persons not liable to be arrested unless the debt amount to 20*l.* As, by the 11 & 12 W. III. c. 9. Sheriffs, &c. are not to take special bail in Wales, or counties palatine, upon process out of his majesty's courts at Westminster, unless affidavit be first made and filed in court, that the cause of action amounts to 20*l.* or upwards.—And by 1 Geo. II. st. 2. c. 14. and 31. Geo. II. c. 10. for encouraging seamen to enter. “No person who shall list himself to serve on board any of his majesty's ships of war, shall be held to bail, but on affidavit that the sum justly due amount to 20*l.*”—A seaman upon the ship's books, though he has absented himself, is a seaman within the act; and armourers, gunners, &c. enlisted as common seamen are within it^d.

^d 1 Crompt. Prac. 32.

CHAPTER X.

Of Personal Actions and the Mode of commencing and proceeding therein, from Commencement of the Suit, to Judgment, and Execution thereof. Evidence on a Trial by Jury.

THIS chapter being compiled with a treble aspect ; as, first to explain the technical terms and law phrases unavoidably made use of in various former parts of the work. Secondly, to give the reader a conception of the mode of commencing and proceeding in personal actions, particularly in those brought on a bill of exchange or promissory note. Thirdly, to shew what is sufficient evidence on a trial for proving the points treated on in our two last preceding chapters ; and likewise what is necessary for persons concerned in any way of trade or business to be acquainted with ; we shall here first attend to personal actions, and briefly point out the mode of commencing and proceeding therein from commencement of the suit to judgment and execution thereof. In § II. treat on the evidence on a trial by jury ; as concerning what will be allowed and the mode of giving it. On when books of account or shop books may be evidence, and on a witness being allowed to refresh his memory by any book or paper. On a confession under a party's hand by letter or otherwise being admitted as evidence. On admission of a debt being evidence. In § III. on what must be evidenced by writing. Leases by parol, when binding. Agreements, contracts, when requisite to be in writing ; what contract for the sale of goods will be binding. What undertaking will bind where one comes to procure credit for another, or promises to pay in respect of another. In § IV. on the competency of witnesses, who are and are not to be received ; as infamous persons, infidels, persons wanting the use of their reason, and children. In § V. on incompetent witnesses as persons interested ; husbands and wives excluded being witnesses : other relations admitted. Persons being admitted as witnesses in criminal prosecutions. In § VI. on a person not being a competent witness to impeach a security which he has given, although not interested in the event of the suit. Witness being admitted by releasing his interest.

§ I. 1. AS to personal actions, of those there are various kinds suited to different cases ; as actions of *assumpsit*, debt, trespass, &c. whereof further mention will presently be made. Those actions

actions are commenced by an attorney employed by the *plaintiff*, that is, he who brings the action, and he against whom it is brought is called the *defendant*; and if the plaintiff's demand amount to 10l. or upwards, and he intends to arrest the defendant, as he may unless defendant be a person privileged from arrest, as heretofore treated on in C. IX. § VII. he must in order thereto make a positive oath of so much being due to him; and if the suit is defended other evidence must be produced at the trial, which evidence will be the subjects of the second and following sections of this chapter. When the plaintiff has made oath of his debt, or if he does not intend to arrest, the attorney sues out a writ or process, previous to the return of which a *declaration* is usually drawn in writing, wherein the plaintiff's cause of complaint is set forth at length, of which further mention will be made hereafter. And here we may just mention that, an action is defined to be a prosecution to judgment what is due to one's self, or a legal demand of one's right. The suit or following the prosecution until judgment, is regularly called an action, but not afterwards; and therefore it is, that a release of all actions, is not a release of an execution.

DEBT, is an action that lies against a person who owes another a certain sum of money on bond or contract, for a thing sold, which the debtor refuses to pay at the day agreed; then the creditor shall have an action of debt against him for the same: and where the money is due upon any specialty (that is, any deed or instrument, under the hand and seal of a person) this action and no other lies. In this action, if defendant let judgment go by default it is absolute, as shewn in C. IX. § III. par. 2.—In actions of debt upon simple contract, or for amerciamment, in actions of detinue, and of account, where the debt may have been paid, the goods restored, and the account balanced without any evidence of either, the defendant is admitted to wage his law, that is, to swear that he does not owe the plaintiff any thing; but this is not allowed where there is any specialty by bond or deed.—Wager of law was more common formerly than it is now; for as the defendant is only allowed to wage his law in an action of debt: at present one shall hardly hear of an action of debt brought upon a simple contract, that being supplied by an action of trespass on the case, for a breach of promise or assumpsit; and this being an action of trespass, no law can be waged therein. So that wager of law is now quite out of use, being avoided by the mode of bringing the action, but still it is not out of force. And therefore, when
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a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law shall be allowed^a.

ACTION of debt is seldom brought on a bill of exchange or promissory note; and it has been held that it could not be maintained against the acceptor of a bill though it might against the drawer^b. It is said that it will lie against the maker of a note, yet not against the indorser^c. And it is held that the payee of a bill importing to have been given for value received, may maintain *indebitatus assumpsit* against the drawer^d. And in a late case lord Mansfield held that the indorsee of a note might maintain *indebitatus assumpsit* thereon against the person who indorsed it to him^e.

THE action usually brought on a bill of exchange or promissory note is that of *assumpsit*, and which of all actions founded upon contract none is of more general use, it being founded upon a contract either expressed, or implied by law, and gives the plaintiff damages in proportion to the loss he has sustained by the violation of the contract. In this action different counts are set forth in the declaration, so that if the plaintiff fails in the proof of one he may recover in another; as suppose an action to be brought by the payee of a promissory note against the maker. Here the plaintiff in his declaration setting forth his cause of complaint at length, stating the note as made by the defendant, counts or declares that by reason thereof defendant became liable to pay the sum of money mentioned in the said note; and least he should fail in the proof of this, he counts or declares likewise, that defendant was indebted to him in another sum of money lent; and then avers that he promised to pay the same, and so on in three or four different shapes; and at last concludes with declaring that defendant had and still refuses to pay any of the said sums or any part thereof, whereby he is injured and hath suffered damage to such a value. And if he proves the case laid in any one of the counts, though he fails in the rest, he will recover proportionable damages.—Concerning the declaration we have copiously treated in C. IX. § 1. and laid down various forms thereof.

2. To the plaintiff's declaration defendant must within a certain limited time put in his plea in writing, otherwise the plaintiff

^a Law's Disposal, 55.

^b Hard. 485.

^c 1 Mod. Ent. 312. pl. 13.

^d 12 Mod. 345.

^e *Kestlebow v. Tims*, E. 22 Geo. III.
—*indebitatus assumpsit*, is used in declarations and law proceedings where

one is indebted unto another in any certain sum; it is also an action thereupon. And it has been held, that action upon *indebitatus assumpsit* lies in no case but where debt will lie for the same thing. 1 Salk. 23.

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plaintiff will have judgment against him by default, a description of which judgment we have in C. IX. § III. par. 2. Yet in general the defendant may have further time granted him for pleading, and in some actions, as that of debt above-mentioned, may crave *oyer* of the writ, or of the bond, or other specialty upon which the action is brought, that is, to hear it read to him. When defendant has put in his plea, if it does not amount to an issue or total contradiction of the declaration but only evades it, the plaintiff may plead again, and reply to the defendant's plea. To the replication the defendant may rejoin, or put in an answer called a rejoinder. The plaintiff may answer the rejoinder by a *sur-rejoinder*; upon which the defendant may rebut; and the plaintiff may answer him by a *sur-rebutter*. The declaration and whole of this process is denominated the pleading^f, and is performed here in town by gentlemen termed special pleaders, who are employed by the country attorney's agent here. Of those pleadings is composed the record that is to be carried down to the assizes, when the cause is to be tried, after issue joined upon matter of fact, in manner hereafter mentioned.

3. IF the declaration is not agreeable to law defendant may demur thereto, that is when issue is joined upon matter of law and not upon matter of fact, the former of which is called a *demurrer*; and it confesses the facts to be true as stated by the opposite party; but denies that, by law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *viz.* rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration: if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea: and so on in every other part of the proceedings, where either side perceives any objection in point of law, upon which he may rest his case. — The form of such demurrer is by averring the declaration or plea, the replication, or rejoinder to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alledged. — When there is a joinder in demurrer the parties are at issue in point of law; which issue in law, or demurrer, the judges of the court before which the action is brought must determine. And if they give judgment on demur-

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^f 3 Black. Com. 293. 310.

rer in *debt* for the plaintiff in the action, the judgment is for the plaintiff to recover his whole debt, costs, and damages; but if it be in action of the case, a writ of inquiry of damages, treated on in C. IX. § III. par. 2. must be awarded, before the plaintiff can have *final* judgment. If judgment on demurrer is for the defendant in the action, the judgment is, that the plaintiff take nothing by the writ, or bill, and that the defendant go *sine die*, i. e. without a day; for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon the summons, but must be warned afresh, and the whole must begin a new, or as it is usually termed *de novo*.

If issue is joined upon matter of fact only, and not the law, in dispute. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus, "and this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," it may be immediately subjoined by the other party, "and the said A. B. doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question.—This issue, of fact, must generally speaking be determined, not by the judges of the court, but by some other method; the principal of which methods is, that by the country, that is, the jury.

AND in order to have this issue of fact thus determined; when the general day of trial is fixed, the plaintiff or his attorney must bring down the record, which is a history of the most material proceeding entered on parchment, to the assizes, and enter it with the proper officer, in order to its being called on in course. If it be not so entered it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by *proviso*. But this practice of trial by *proviso*, begins to be disused, since the statute 14 Geo. II. c. 17. which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit.

WHEN the cause is called on in court, the record is handed to the judge, and the jury, then called over each by name, are

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to be sworn, unless challenged by either plaintiff or defendant, as they may be for divers reasons, as on account of supposed malice, favour, kindred, interest, &c. and it is common at the calling of the jury for either plaintiff or defendant to challenge any one or more of the jurors before sworn, and such person or persons so challenged, are usually omitted and others sworn in their stead. When all are sworn, who are to be twelve in number, the opening counsel briefly informs them what has been transacted in the court above, the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly upon what point the issue is joined, which is there sent down to be determined. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and, when the evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

4. AFTER the cause is tried and the jury hath found a verdict, it is usual if either party is dissatisfied, previous to the judgment, which is given in the next ensuing term after the trial, for the dissatisfied party to move the court by counsel, for a *rule* to shew cause why there should not be a new trial.— Causes of *suspending* the judgment by granting a new *trial*, are at present wholly *extrinsic*, arising from matter foreign to or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has mis-directed the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the court to award a *new*, or second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones^s.—If the *rule* moved for, as above mentioned, be obtained, a copy thereof is served on the opposite party to shew cause on a certain day therein mentioned; and if good cause be shewn the court will order the rule to be discharged, otherwise

otherwise to be made absolute; whereby a new trial is granted.

IF upon trial verdict be found specially; as where there arises in the case any difficult matter of law, the jury, for the sake of better information, will find a *special* verdict. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried. — Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or court above, on a *special case* stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision; the *poslea*, which will presently be defined, being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. — When the jury hath found a verdict for either plaintiff or defendant, or, if the plaintiff makes default, or is nonsuit; or whatever is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a *poslea*. The substance of which is, that *poslea*, afterwards, the said plaintiff and defendant appeared by their attornies at the place of trial; and the jury being sworn, found such a verdict, or, that the plaintiff after the jury sworn made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the *poslea*.

5. WHEN judgment is obtained, and before execution had thereon, the vanquished party sometimes brings a writ of error, upon some matter of law arising upon the face of the proceedings, and the court into which this writ is brought, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment.

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6. IF no writ of error is brought and the judgment is not suspended, superseded, or reversed, (as it may be by some other writs, though the principal redress for erroneous judgments is the writ of error) the next and last step is the execution of judgment; or putting the sentence of law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered. Executions where money only is recovered, as a debt or damages, (and not any specific chattel) usually are either a writ of *feri facias*, which issues against the defendant's goods, empowering the sheriff to seize and sell them; a writ of *capias ad satisfaciendum*, to imprison defendant's person; or a writ of *elegit*, by which his goods and chattels are appraised, and delivered to the plaintiff in part of satisfaction of his debt: and likewise, if the goods be not sufficient, a moiety or one half of his freehold lands, which he had at the time of the judgment given, is to be delivered to the plaintiff, to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired. If part only of the debt be levied on a *feri facias*, the plaintiff may have a *capias ad satisfaciendum*, or an *elegit* for the residue. But when defendant's body is once taken on a *capias ad satisfaciendum*, no other execution can be had against his goods or lands, unless in case of his death or an escape. Also after an *elegit* and seizure of his lands, the body of the defendant cannot be taken; but if the *elegit* has only the effect of a *feri facias*, and there be no lands, the body may be taken.

§ II. 1. AS to evidence in a trial by jury, which as we hinted at the beginning of this chapter, must, in order to recover what is sued for in an action at common law, be other than that of the plaintiff's own oath, which is not allowed as evidence in a trial by jury; as that persons interested, and likewise infamous persons are not admitted to be witnesses, as will be seen hereafter in § IV. and here we shall proceed to shew what evidence will be allowed, and the mode of giving it on a trial by jury.

EVIDENCE in a trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive from their own private knowledge, of which further mention will be made hereafter in par. 7. The former or *proofs*, (to which in common speech the name of evidence is usually confined) are either written, or *parol*, i. e. by word of mouth. Written proofs or evidence, are records and ancient deeds of thirty years standing, which prove themselves; but modern
S deeds

deeds and other writings must be attested and verified by *parol* evidence of witnesses. And the *one general rule* that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed^a. As, if a man offer a copy of a deed or will, where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will, that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence; but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: the presumption of greater evidence behind in the party's possession being overturned by positive proof^b. Of which further mention will be made in the ensuing paragraph. So no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts^c.—Where the issue is on the legitimacy of the plaintiff or defendant, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married; and with reason, for the presumption arising from the cohabitation, is either strengthened or destroyed by such declarations, which are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief one way or other. So to prove my father, mother, cousin, or other relation beyond the sea dead, and the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. In an ejectment between the duke of *Athol* and lord *Ashburnham*, E. 14 Geo. II. Mr. Sharpe, who was attorney in the cause, was admitted to prove, that Mr. Worthington told him he knew and had heard in regard to the pedigree of the family, Mr. Worthington happened to die before the trial. So in questions of prescription it is allowable to

^a 3 Black. Com. 367.^b Law of Nisi Prius, 294. Edit. 1785.^c 3 Black. Com. 367.

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to give hearsay evidence in order to prove general reputation; and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed^d.—Declarations by tenants are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it not resisted by contrary evidence is decisive^e.

2. PAROL testimony may be given of a bill of exchange on an indictment for forging it, notwithstanding the bill is proved to be in existence; for the possession of the holder is the possession of the prisoner, and he is not bound to produce it against himself; as demonstrated in Aickle's case related in C. VII. § IV. par. 2. Copies of written documents may be given in evidence, if the originals are in the hands of the parties, and they refuse, on notice, to produce them. And there is no difference with respect to admitting copies in evidence, between civil actions and criminal prosecutions; as on the trial of an information in the Exchequer, before Mr. Baron Eyre, in December 1772, against one Le Merchand, on 7 Geo. I. c. 21. for importing tea *directly* into Guernsey, it appeared that the defendant had written several *original letters* to one Channon, a witness on the trial. Channon became a bankrupt, but these letters were proved to have come again into the defendant's possession, by virtue of an order of the court of Chancery, to deliver to *him* all letters and papers seized under Channon's commission. The solicitor of the excise, however, had contrived to take copies of them whilst they were in the hands of the clerk of the commission. Notice had been given to the defendant to produce the *original letters*, which he refused to do. The Attorney-General therefore offered to read the copies in evidence. It was objected that being a *criminal prosecution* the defendant was not bound by the notice to produce evidence against himself; and therefore the copies could not be read in evidence against him. Mr. Baron Eyre thought there was no difficulty in this point between *civil* and *criminal* cases, and he admitted the copies in evidence; not on the idea of the defendant's having after notice refused to produce the originals, but because they were the best evidence which the nature of the case would admit of, or that it was in the power of the party producing them to give. The verdict turned entirely upon this evidence, and the jury found for the crown. On argument for a new trial the

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court

^d Law of Nisi Prius, 294. Edit. 1-85. ² Durnf. & East. Rep. 53.

^e *Davies v. Pierce*, Trin. 27 Geo. 111.

court discharged the rule, and confirmed the principles upon which the evidence had been admitted^f.

3. BOOKS of account or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence: for, as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can then be produced. However, this dangerous species of evidence is not carried so far in England as abroad; where a man's own books of account, by a distortion of the civil law (which seems to have meant the same thing as is practised with us) with the suppletory oath of the merchant, amount at all times to full proof. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the statute 7 Ja. I. c. 12. (the penners of which seemed to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted^g.

THE shop-book of a tradesman is not evidence of itself within the year, without some circumstances to make it so. As if it be proved that the servant who wrote it is dead, and that it is his hand-writing, and that he was accustomed to make the entries. As in *lord Torrington's* case, Where the evidence was, that the usual way of the plaintiff's dealings, was that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out, which he set down in a book, to which the draymen set their hands, and that the drayman was dead, and this his hand; it was holden to be good evidence of a delivery. But where the plaintiff, to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand; lord chief justice Raymond would not allow it, saying, it differed from *lord Torrington's* case, because there the witness saw the drayman sign the book every night^h.

UPON

^f Leache's Cases in Crown Law, 269, 272, 273. 2 Durnf. & East. Rep. 201. n.

^g 3 Black. Com. 368.

^h Law of Nisi Prius, 282. Edit. 1785.

UPON an issue out of chancery, to try whether eight parcels of *Hudson's-Bay* stock, bought in the name of Mr. Lake, were in trust for Sir Stephen Evans, his assignees (the plaintiffs) shewed first, that there was no entry in the books of Mr. Lake relating to this transaction. Secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas (Sir Stephen's book-keeper) to the book B. B. of Sir Stephen Evans. Thirdly, Jeremy Thomas was proved to be dead, and upon this the question was, Whether the book of Sir Stephen Evans referred to, in which was an entry of the payment of the money, should be read. And the court of King's Bench at the trial at bar, admitted it not only as to the six, but likewise as to the other two in the hands of Sir Biby Lake. And in *Smartle and Williams*, where the question was, Whether the mortgage money was really paid; a scriviner's book of accounts (the scriviner being dead) was holden to be good evidence of payment¹.

WHERE the right to the soil is in issue, entries written by the steward of a former owner from whom title is derived, are admissible evidence, if the steward be dead. In an action of trespass, wherein the issue was on the soil and freehold of the defendant. At the trial at Chester the plaintiff who derived title under lord Barrymore, offered in evidence several *items* contained in a book in the hand-writing of one Ashley, who had many years ago been steward to lord Barrymore, and was now dead. The manuscript was a common day-book, not particularly appropriated to Ashley's concerns with lord Barrymore, but containing a variety of other matters relating to his different employers; and the *items* in question, three in number, were memorandums of receipts of sums of money by Ashley from different persons by name, but whose situations were not mentioned, for trespasses committed on the common in question, paid on account of lord Barrymore; the first *item* was dated in 1739, the last in 1785. This evidence was rejected; and a verdict having been given for the defendant, a rule was obtained in Mich. term, 32 Geo. III. calling on him to shew cause why there should not be a new trial, on the authority of *Warren v. Grenville*, [2 Str. 1129.]

LORD KENYON, chief justice, We are not now called upon to determine what weight this evidence ought to have in this cause; and perhaps it may turn out on further investigation that these were small sums of money, and paid by persons in poor circumstances to the lord of the manor, with whom they were not in a situation to contend: but the single question here is whether these entries be not admissible evidence. It is clear

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that

¹ *Ibid.*

that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury to shew that such sum was received by him. But it has been objected that the steward's accounts should have been signed by him: if the entry be not in the hand-writing of the steward, undoubtedly it must be signed by him: but here all these entries were written by the steward himself, and therefore they were evidence to charge him with the receipt of the money; and if so, they should have been received in evidence on the trial of this cause, though probably they may not have much weight before the jury.—*Ashhurst, J.* The rule is, that if a steward's entry be sufficient to charge him, it is admissible evidence; and these entries were undoubtedly sufficient to charge him. Suppose lord Barrymore had brought an action against the steward for money had and received, he might have given him notice to produce the books in which these entries were made, and they would have charged the steward with the receipt of these sums.—*Buller and Grose, Justices*, agreeing, the rule was made absolute^k.

A WITNESS may refresh his memory by *any* book or paper, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection any farther than finding it entered in a book or paper, the *original* book or paper must be produced. On a motion for a new trial it appeared from the judges report that, one *Aldridge*, the witness, whose testimony was objected to, went round with the receiver of the rents to the different tenants, whose declarations respecting the times when they severally became tenants were minuted down in a book at the time; some of the entries therein made by *Aldridge*, and some by the receiver. When *Aldridge* was examined the original book was not in court; but he spoke concerning the dates of the several tenancies from extracts made by himself out of that book, confessing upon cross-examination that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts was founded altogether upon the extracts which he had made from the above-mentioned book. This evidence was objected to at the time on the part of the defendants, upon the ground that, as the witness did not pretend to speak to those facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book from whence they were taken ought to be produced. The learned judge however being of a different opinion, the evidence was admitted, and the plaintiff had a verdict.

THE

^k *Perry v. Jackson*, Hil. 32 Geo. III. 4 Durnf. & East, Rep. 516.

THE counsel in support of the rule for a new trial, insisted on the known distinction between cases where the witness swears from his own knowledge of the fact, though his memory may be assisted by memorandums, and where he does not speak from any recollection which he has, but merely from such memorandums; in the latter case it has always been required that the *original minutes* should be produced, because of the great door which might otherwise be opened to fraud and concealment. For it might happen in a variety of instances that something would appear upon the original paper itself, which would do away the effect of the evidence, but which might be suppressed in a *copy* and still more easily in an *extract*.

THE court did not appear to entertain much doubt as to the inadmissibility of the evidence, but they said that as it was a matter of such general practice they would consider of it, that the rule might be finally settled for the future.—LORD KENYON, chief justice, read a manuscript note of the late lord Ashburton, part of which is as follows.—Michaelmas Vacation 1753, at Lincoln's-Inn-Hall, before the lord Chancellor—3d December. Mr. Noel moved to suppress depositions on a certificate from the commissioners, before whom they had been taken, that the witness, whose depositions they were, refreshed her memory during her examination by minutes consisting of six sheets of paper of her own hand-writing, the substance of which she declared to them she had set down from time to time as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition, which she told them was done by the plaintiff's solicitor, whom she had requested to digest her notes and reduce them to some order; and that after he had done so she transcribed and altered them wherever it was necessary to make them consistent with her meaning. The certificate added further that she declared the six sheets to have been entirely drawn up herself, unassisted by any person whomsoever; that as they apprehended they had no right to take the minutes from her, she had frequent recourse to them during her examination: and this certificate was signed by all the commissioners.—Lord Chancellor. Whether there has been any tampering or no I know not; but I know there has been a great mistake both by the parties and the commissioners, who however did right, after their mistake, to lay it before the court. Should the court connive at such proceedings as these, depositions would really be no better than affidavits; for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from memorandums furnished by the witness, I might as well let the attorney draw an affidavit for her, and use that instead of a deposition.

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She insists indeed that she altered and amended it, but every body knows that slight alterations in a phrase make it convey very different ideas. To be sure in some cases a man may use papers at law, but I have known some judges [and I think I adhered chiefly to that rule myself] let them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered which were drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing. The commissioners should have rejected those depositions: but as they have fairly represented the fact, and the whole of the motion is to suppress the depositions, for precedent sake they shall be suppressed. And as publication is not passed you may examine the witnesses.

On the following day Mr. Justice Buller read another manuscript note of *Tanner v. Taylor*, Hereford spring assizes 1756. "In an action for goods sold, the witness who proved the delivery took it from an account which he had in his hand, being a copy as he said, of the day book, which he had left at home: and it being objected that the original ought to have been produced, Mr. Baron Legge said, that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it, but if he could not from recollection swear to the delivery any further than as finding them entered in his book, then the original could have been produced: and the witness saying he could not swear from recollection the plaintiff was nonsuited." And

LORD KENYON, chief justice, said that the rule appeared to have been clearly settled, and that every day's practice agreed with it. And that comparing this case with the general rule, the court were clearly of opinion that, *Aldridge* the witness ought not to have been permitted to speak to facts from the extracts which he made use of at the trial.—Rule absolute for a new trial¹.

4. A CONFESSION under a party's hand by letter or otherwise will be admitted in evidence. But a confession by letter must be proved to be of the party's hand-writing; and, where no body saw the writing, that must be by the comparison of hands. Now the reason why the comparison of hands is allowed to be evidence is, because men are distinguished by their hand-writing as well as by their faces; for it is very seldom that the shape of their letters agree any more than the shape

¹ *Doe v. Perkins*, Trin. 30 Geo. III. 3 Durnf. & East, Rep. 749.

shape of their bodies. Therefore the likeness induces a presumption that they are the same; and every presumption that remains uncontested hath the force of an evidence. But in the case of high treason, comparison of hands is not sufficient for the original foundation for an attainder, as hereafter mentioned in § 111. par. 4.—In general cases the witness should have gained his knowledge from having seen the party write, but under some circumstances that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in the course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write: As where a parson's book was produced to prove a *modus*; the parson having been long dead, a witness who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the hand-writing, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce^m.

RECORDS exemplified under the broad seal may be admitted in evidence. But the exemplification of deeds under the broad seal cannot.—If a verdict is to be given in evidence, an office copy of the whole record must be made by the proper officer, examined and sworn to.—No verdict shall be given in evidence, but between such who are parties or friends to it, with this restriction, that it is of a matter which was in issue in the former cause.—Where a deed is inrolled (pursuant to the statute), the indorsement of the inrollment is evidence, without further proof.—Where a fine is to be proved with proclamations, the proclamations must be examined with the roll.—As to recoveries. When you shew a modern recovery you must prove seisin in the tenant to the *præcipe*. In an ancient recovery seisin will be presumed, especially where possession is gone agreeable to it ever since.—A bill in chancery is evidence against the plaintiff, and so is the answer of the defendant; but both must be read from an office copy, sworn to be examined. The office copies of depositions are evidence in chancery, but not at common law, without examination.—A decree may be given in evidence between the same parties, or any claiming under them.—Probate of a will or letter of administration under seal is good evidence as to the personal estate.—The rolls of a court baron are evidence; for they are the public

^m Law of Nisi Prius, 236. Edit. 1785.

public rolls by which the inheritance of every tenant is preserved.—The register of christenings, marriages, and burials is good, or the copy of it, copied exactly, and examined from the original.—A copy of the admission to a copyhold estate is good evidence, examined by the court rolls ^a.

5. AN admission of a debt if satisfactorily proved, is the strongest evidence ; as suppose A. owes me 50*l*. money privately borrowed, or for goods sold and delivered by myself ; and for this 50*l*. I have no evidence, my own oath on a trial by jury not being admitted, notwithstanding I may have arrested A. thereon for this debt. Now if A. admits or confesses this sum to be due to me by letter, or in the presence of a third person, this confession or admission of A's will be evidence on a trial by jury of the debt being due to me. But an offer to pay money by way of compromise is not evidence of a debt. The reasons often assigned for it by lord Mansfield were, that it must be permitted to men "to buy their peace" without prejudice to them if the offer did not succeed ; and such offers are made to stop litigation without regard to the question whether any thing or what is due.—If the terms "buy their peace" are attended to they will resolve all doubts on this head of evidence : But for an example I will add one case. If A. sue B. for 100*l*. and B. offer to pay him 20*l*. it shall not be received in evidence ; for this neither admits or ascertains any debt, and is no more than saying he would give 20*l*. to get rid of the action. But if an account consists of ten articles, and B. admits that a particular one is due, it is good evidence for so much.—Admission of particular articles before an arbitrator are also good evidence, for they are not made with a view to a compromise, but the parties are contesting their different rights as much as they could do on a trial ^b.

6. POSITIVE proof is always required, where from the nature of the case it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumptions must take place : for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact, is the proof of such circumstances, which either necessarily, or usually attend such facts ; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. Violent presumption is many times equal to full proof, for there those circumstances appear,

^a Impey's King's Bench Prac. 301, 302. 4 Edit.

^b Law of Nisi Prius, 236. Edit. 1790.

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pear, which necessarily attend the fact. As if a landlord sues for rent due at Michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption that no proof shall be admitted to the contrary.— Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight: as if, in a suit for rent due 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant, unless it be clearly shewn that the rent of 1754, was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing.—Light, or rash, presumptions have no weight or validity at all^c.

7. THUS having proceeded, before we enter on things that must be evidenced by writing, which will be the subject of our ensuing section; we may here attend to the mode of giving evidence on a trial by jury, as that the oath administered to the witness (one witness, if credible, being sufficient evidence of any single fact, as will again be mentioned hereafter in § III. par. 4.) is, not only what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attornies, the counsel, and all by-standers; and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country. This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of
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adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.—As to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment as the written or parol evidence which is delivered in court; and therefore it hath been often held, that though no proofs be produced on either side, yet the jury might bring in a verdict; for the oath of the jurors, to find according to their evidence, was construed to be, to do it according to the best of their knowledge. However, since *new trials* were introduced, this doctrine has been gradually exploded; as that it is quite incompatible with the grounds, upon which such new trials are every day awarded, *viz.* that the verdict was given *without*, or *contrary to*, evidence. And therefore, together with new trials, the practice seems to have been first introduced, which now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court^d.

§ III. I. AS to what must be evidenced by writing. By statute 29 Car. II. c. 3. (called the statute of frauds) several things must be evidenced by writing, of which before that statute parol evidence had been sufficient. By this statute, all leases, estates, interest of freehold, or term of years, created by parol, and not put in writing and signed by the parties making the same, or their agents thereunto lawfully authorised by writing, shall have the effect of estates at will only, except leases not exceeding three years from the making, whereupon the rent reserved amounts to two-thirds of the improved value, and that no such estate or interest shall be granted or surrendered but by deed or note in writing.—A lease by parol for a year and an half, to commence after the expiration of a lease which wants a year of expiring, is a good lease within this statute, for it does not exceed three years from the making. And if land be leased to A. for a year, and so from year to year as long as both parties shall agree; this is a lease for two years certain, and if the lessee hold on after two years, he is not a lessee at will (as the old opinion was) but for a year certain, for his holding on is an agreement to the original contract; and such an executory contract is not void by the statute of frauds, for there is no term for above two years ever subsisting at the same time: But if the original contract were only for a year, or if it were 8l. *per annum* rent without mentioning any time certain, it would be a tenancy at will after the expiration of the year, unless there were some evidence,

^d 3 Black. Com. 372. 374.

dence, by a regular payment of rent annually or half yearly, that the intent of the parties was that he should be tenant for a year. — A written agreement in these words, "A. *doth let and sell to* B. for a term of three years," &c. was offered in evidence in an action of *assumpsit* on a special agreement. The defendant objected to its being read, because it was a lease and was not stamped. For the plaintiff it was said this was only a memorandum of a parol lease, which being for three years only is good as such, and that the statute in using the words, "Indenture, Lease, or Deed Poll," meant only deeds. But it was holden that though a parol lease for three years is good, yet if a man through caution will reduce it into writing, he must pay for the stamp: otherwise the court are inhibited from receiving it in evidence*.

2. By the statute of frauds, all declarations and assignments of trusts shall be proved by some writing signed by the party, or by his last will, except trusts arising, transferred, or extinguished by implication of law. And it is hereby enacted, That no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized. And that no contract for the sale of goods, wares, and merchandize, for the price of 10*l. sterling* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged, or their agents thereunto lawfully authorized.

THIS statute will prevent a parol agreement, to buy goods without earnest or delivery, from giving the buyer any property in them. In an action of trover for sheep, tried before Mr. Justice Grose, at the assizes at East-Grinstead, it appeared that the plaintiff had agreed to buy the sheep of the defendant at Lewes fair, and to take them away at a certain hour. There
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* Law of Nisi Prius, 269. 279. 177. 85. Edit. 1785.

was no money paid or any sheep delivered. The plaintiff not coming at the appointed time, nor sending to take the sheep, the defendant sold them to another person.—Verdict being found for the plaintiff, a rule was obtained to shew cause why it should not be set aside, and a non-suit entered. Against the rule it was argued, that as the sheep were sold to the plaintiff, there was sufficient property in him to maintain the action; and as they were re-sold by the defendant, a sufficient conversion on his part. But the court held, that the statute of frauds prevented any property from vesting in the plaintiff so as to enable him to maintain trover, there being neither earnest, delivery, nor agreement in writing.—Rule absolute ^f.—A. and B. entered into a verbal agreement, for sale of 3000 sacks of flour, to be delivered to A. at a future period: there is neither earnest paid, a note or memorandum in writing signed, nor any part of the flour delivered: this contract is void, being within the statute of frauds, though it is executory, and though it has been admitted by B. in his answer to a bill in chancery, filed by A. ^g.

WHERE defendant bespoke a chariot, and when made refused to take it: In an action for the value, Pratt, chief justice, held this not to be a case within the statute, which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable without time given him by special agreement, and the seller is to deliver the goods immediately ^h.

THE defendant bought a lot for more than 10l. at an auction, catalogues and conditions of the sale were printed, and the defendant was the best bidder. The auctioneer wrote the defendant's name and the price against the lot in the printed catalogue by the order and assent of the defendant. Between the day of the sale and the time of taking the lot away, the defendant sent his servant to see them weighed; which he did. The defendant neglecting to take away the goods, they were re-sold at a considerable loss; and an action was brought for the difference, and the court strongly inclined that sales by auction were not within the statute of frauds, because multitudes are generally present, who can testify the terms of the contract. 2. They held the contract was here sufficiently reduced into writing, and signed by an agent of the defendant's; for the auctioneer for that purpose was his agent. 3. They held the weighing by his servant was a delivery. 4. Yates justice, held that as the contract was executory, *viz.* the lot to be fetched away in six weeks, that therefore it was not within the statute ⁱ.

MUTUAL

^f *Alexander v. Comber*, Trin. 28 Geo. III. 1 H. Black. Rep. 20.

^g *Rondeau v. Wyatt*, Trin. 32 Geo. III. 2 H. Black. Rep. 63.

^h Str. 516. Law of Nisi Prius, 280.

ⁱ *Simon v. Metivier*, K. B. Trin. 6 Geo. III. Law of Nisi Prius, 280.

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MUTUAL promises to marry are not within this act, which relates only to contracts in consideration of marriage^k.—So a promise to pay upon the return of a ship is not within the statute, for the ship by possibility may return in a year.—So a promise to pay 6l. a year wages, and to leave an annuity of 16l. *per annum* for life by will is not within this act, for it might by possibility be perfected within the year^l.

3. WHERE the undertaker only comes in aid to procure credit to the party, there is a remedy against both; and both are answerable according to their distinct engagements. But where the whole credit is given to the undertaker, so that the other party is only as his servant, and there is no remedy against him; this is not a collateral undertaking. Therefore if two come to a shop, and one buy; and the other to gain him credit, promise the seller, "If he do not pay you, I will;" this is a collateral undertaking, and void without writing: but if he say, "Let him have the goods, I will be your paymaster;" this is an undertaking for himself, and he shall be intended the very buyer, and the other to act as his servant. But if A. promise B. that if he will cure D. of a wound, he will see him paid; it is only a promise to pay, if D. do not; and therefore ought to be in writing. However it is impossible to lay down any precise rule for the construction of such sort of words, but it must be left to the jury to determine, upon the whole circumstance of the case, to who the original credit was given^m.

WHEREVER a person is under a moral obligation to do a thing, and another does it without request from him, a subsequent promise to pay is good, though not in writing: As where a pauper is taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attends and cures her, and after the cure the overseers promise payment by parol, this is good; for overseers are under a moral obligation to provide for the poorⁿ.

AN action was brought against the defendant and two others, for appearing for the plaintiff without a warrant, and the defendant promised that in consideration the plaintiff would not prosecute that action, he would pay him 10l. and costs of suit. This was holden not within the statute. But *per Holt*, if A. say, don't go on against B. and I will give you 10l. in full satisfaction of the action, this would be within the statute^o.

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^k *Cooke and Baker*, Hil. 3 Geo. II. C. B. Salk. 280. Law of Nisi Prius, 280.

^l *Fenton v. Emlyn*, K. B. Hil. 2 Geo. III. Law of Nisi Prius, 280.

^m Law of Nisi Prius, 279, 280.

ⁿ *Watson v. Turner & al'*, Exchequer. Trin. 7 Geo. III. Law of Nisi Prius, 281.

^o Law of Nisi Prius, 281.

IN consideration that the plaintiff would not sue A. B. the defendant promised to pay the plaintiff the money due, *viz.* 4*l.* in a week ; this was holden to be within the statute of frauds ; for no consideration laid that the plaintiff had promised not to sue, and if he had A. B. could not in no sort have availed himself of this agreement, but the debt is still subsisting, and consequently the promise collateral ^p.

BUT where in consideration, that the plaintiff in an action of assault and battery against J. S. would withdraw the record, and forbear to proceed, the defendant promised to pay him 3*l.* the court held this to be a new consideration sufficient to raise a promise and not within the statute.

So if A. promise C. that in consideration of his doing some particular act, B. will pay him such a sum, A. is the principal debtor, for the act done is on his credit, and not on B's ^q.

MANY of the doubts upon this statute have arisen by making use of the word *collateral* ; which is not a word used in the Act of Parliament. The proper consideration is, whether it be or not a promise to answer for the debt of another ; for if it be, though it be upon a new consideration, and therefore strictly speaking, not a collateral undertaking, yet it is within the statute, and the adding to the promise of the payment of the debt, a promise to pay the costs of the action would make no difference ^r.

NOTE ; *per* Treby, chief justice, a contract for the sale of timber growing upon land is not within the statute, but may be by parol ; because it is a bare chattel ^s.

UPON that part of the clause which directs that no action shall be brought on any agreement not to be performed within one year from the making, unless the agreement be in writing ; it has been holden, that a promise to pay money on the return of a ship, which happened not to return within two years after the promise made, is not within the statute : for by possibility, the ship might have returned within a year ; and though by accident it happens not to return so soon, yet it does not bring the case within this clause of the statute, which extends only to promises, where, by the express appointment of the party, the thing is not to be performed within a year ^t.

A man contracts to pay 100*l.* on the day of marriage, this need not be put in writing, for it depends upon a contingency, which may, or may not be performed within a year ^u.

4. HAVING thus proceeded we come now to advert to what was mentioned in § II. par. 7. concerning the mode of giving evidence

^p *Ibid.*

^q *Ibid.*

^r *Ibid.*

^s *Ibid.* 282.

^t *Ibid.*

^u *Ibid.*

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evidence on a trial by jury; for which one witness (if credible) is sufficient evidence of any single fact; though, it is without doubt, the concurrence of two or more corroborate the proof; yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two, as the civil law universally requires. Yet here it should be observed that, although the doctrine of evidence upon pleas of the crown is, in most respects the same as that upon civil actions; there are however a few leading points wherein by several statutes and resolutions, a difference is made between evidence in civil suits and criminal prosecutions; for in all cases of high-treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. two lawful witnesses are required to convict a prisoner; unless he shall willingly, and without violence, confess the same. But in all other cases except treason, one single evidence is sufficient for the King in criminal prosecutions^v. And in all cases where there is no corruption of blood, a conviction of high-treason may be upon the evidence of one witness. As, at the Old-Bailey, January Session 1748, an indictment being for high-treason, in filing and diminishing the current coin; one witness only was produced to prove the fact; and it was submitted to the court whether upon the construction of the statutes, 1 Edw. VI. c. 12. 5 & 6 Edw. VI. c. 11. 1 & 2 Ph. and Mary, c. 10. and 7 Will. III. c. 3. s. 2. any person can be convicted of high treason, upon the testimony of a single witness. The court were decidedly of opinion, that one witness is sufficient to prove any treason, where there is no corruption of blood^w.—Corruption of blood is where a person is attainted of treason or felony, by means whereof his blood is said to be corrupted, and neither his children, nor any of his blood, can be heirs to him or any other ancestor. A statute which saves the corruption of blood, impliedly saves the descent of the land to the heir; and it prevents the corruption of blood so far: also it saves the wife's dower. But nevertheless the land shall be forfeited for the life of the offender^a.

CONCERNING comparison of hands having the force of evidence, as mentioned in § II. par. 4. In case of high treason, comparison of hands is not sufficient for the original foundation of an attainder, because there must be proof of some overt act, and writing is not an overt act; but herein it may be used as a circumstantial and confirming evidence, if the fact be otherwise

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proved;

^v 4 Black. Com. 356.^a 3 Inst. 47. 1 Hawk. 107.^w Leach's cases in Crown Law, 43.

proved; and in any other criminal prosecution it will be evidence the same as in a civil suit^b.

§ IV. 1. AS to the competency of witnesses. All witnesses of whatsoever religion or country, that have the use of their reason, are to be received and examined; except such as are *infamous*, or such as are interested. The latter will be treated on in our fifth and sixth sections, and here we shall attend to infamous persons, and such as want the use of their reason.

INFAMOUS PERSONS, are such whose reputation is blemished by particular crimes which may render the party ever after unfit to be a witness; as treason, felony, and every *crimen falsi*, as perjury, forgery, and the like: for where a man is convicted of those glaring crimes against the common principles of humanity and honesty, his oath is of no weight.—The common punishment that marks the *crimen falsi*, is being set in the pillory, and therefore, anciently they held that no man legally set in the pillory could be a witness; but the rigour of this piece of law is reduced to reason; for now it is holden, that unless a man be put in the pillory *pro crimine falsi*, as for perjury, forgery, or the like, it is no blemish to his attestation; it is the crime, not the punishment, that makes the man infamous; therefore, where a man was convicted of barretry^c, though he was only fined, the court held him incompetent; so a person convicted of petit larceny is equally infamous with one convicted of grand larceny, for they are both felony.^d

BUT after a general statute pardon, a person attainted^e is a good witness; and so it is after burning in the hand, which amounts to a statute pardon.—If one found guilty on an indictment for perjury at common law, be pardoned by the king, he will be a good witness, because the king has power to take off every part of the punishment; but if a man be indicted of perjury on the statute, the king cannot pardon, for the king is divested of that prerogative by the express words of the statute: however it should be observed that the party who would take advantage of those exceptions to a witness, must have a copy of the record of conviction ready to produce in court^f.

ANOTHER

^b Law of Nisi Prius, 236.

^c Barretry is the offence of frequently exciting and stirring up suits and quarrels between his Majesty's subjects, either at law or otherwise. The punishment for which in a common person is fine and imprisonment. If the person belongs to the profession of the law, the punishment may be transpor-

tion. 1 Hawk. P. C. 243. 12 Geo. I. c. 29.

^d Law of Nisi Prius, 292. Edit. 1785.

^e Attainted is the next step after conviction, and is when judgment is awarded by the judge. Law's Disposal, 147. 7 Edit.

^f Law of Nisi Prius, 292. Edit. 1785.

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ANOTHER class that cannot be witnesses are those styled infidels, i. e. such as profess no religion that can bind their consciences to speak the truth; and a person who has no notion of eternity cannot be examined as a witness; as in White's case at the Old-Bailey in October Session 1786. Thomas Atkins being called as a witness to support the prosecution, and examined on the *voir dire*, [treated on in the ensuing section in par. 2.] said that he had heard there was a God, and believed that those persons who told lies would come to the gallows; but acknowledged that he had never learned the catechism; was altogether ignorant of the obligations of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked persons after death. The court rejected him as being incompetent to be sworn^g.

WHEN any person professes a religion that will be a tie upon him, he shall be admitted as a witness, and sworn according to the ceremonies of his own religion; for it would be ridiculous to swear a witness upon the holy Evangelists, who did not believe those things to be sacred. The Jews are always sworn upon the Old Testament; Mahometans on the Koran, those of the Gentou religion, according to the ceremonies of that religion, &c^h.—Excommunicated persons cannot be witnesses, because being excluded out of the church, they are supposed not to be under the influence of any religion. and the same law, it is said, holds place in relation to popish recusants. This opinion as to the latter is founded on the statute of 3 Ja. I. c. 5. which enacts, that every popish recusant convict shall stand to all intents and purposes, disabled, as a person lawfully excommunicated. But Mr. Serjeant Hawkinsⁱ, has very sensibly said, that this construction is over severe, as the purport of the statute is satisfied by the disability to bring any action.—Persons outlawed may certainly be witnesses, because they are punished in their own properties, and not in the loss of their reputation, and the outlawry has no manner of influence in their credibility^k.

3. As to persons excluded from being witnesses for want of the use of their reason, those are ideots, madmen, and children; but with respect to children, there seems to be no precise time

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^g Leach, 369.^h Law of Nisi Prius, 292.ⁱ Pleas of the Crown, 1 V. 23, 24.^k Law of Nisi Prius, 292, 293.

fixed wherein they are excluded from giving evidence ; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination to the court¹. — In the case of *Brasier*, on the trial of an indictment for a rape on the body of an infant under seven years of age, the prisoner being convicted and the judgment respited on a doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon oath² ? The judges were unanimously of opinion, that no testimony whatever can be legally received except upon oath ; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution provided such infant appears, on strict examination by the court to possess a sufficient knowledge of the nature and consequences of an oath : for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence ; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court ; but if they are found incompetent, their testimony cannot be received³.

§ V. 1. INCOMPETENT WITNESSES, as persons interested. As to those the law of England, which permits, as shewn in § III. par. 4. one witness to be sufficient where no more are to be had ; to avoid all temptations to perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa*, i. e. no one ought to be a witness in his own cause. And it is a general rule that no person interested can be a witness. Yet hereto are divers exceptions.—It must be a present interest, for a future contingent interest will not be sufficient to prevent a person from being a witness ; therefore an heir at law may be a witness, but a remainder man, i. e. he who has the estate by virtue of some limitation made either by will or deed^b, cannot.

An interest is when there is a certain benefit or advantage to the witness attending the determination of the cause one way. Therefore a naked trust does not exclude a man from being a witness. However, a trustee shall not be a witness to betray a trust ; therefore where the defendant pleaded to debt on bond, the 5 & 6 Edw. VI. against buying and selling offices, and upon trial A. was produced as a witness to give an account upon what occasion the bond was given, lord chief justice Holt refused to admit him, because it appeared he was privately intrusted

¹ Law of Nisi Prius. 293. Edit. 1785.

² Leach, 346.

^b Law's Disposal, 32.

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intrusted to make the bargain by both parties, and to keep it secret. And the case is the same as to counsel and attornies, who ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; for it is the privilege of the client and not of the counsel or attorney. It is contrary to the policy of the law to permit any person to betray a secret with which the law hath intrusted him; and it is mistaking it for the privilege of the witness that has sometimes led judges into the suffering such a witness to be examined. But to this there are some exceptions: First as to what such persons knew before the retainer; for as to such matters they are clearly in the same situation as any other person: Secondly, to a fact of his own knowledge, and of which he might have had knowledge, without being counsel or attorney in the cause. As, suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So if the question were about a rasure in a deed or will, he might be examined to the question, whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head. So if an attorney were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge and no matter of secrecy committed to him by his client^c.

By the general rule of law, husband and wife cannot be admitted to be witnesses for each other, because their interest are absolutely the same; nor against each other, because contrary to the legal policy of marriage. However, there are some exceptions to this rule. First, in the case of high treason it has been said, that a wife shall be admitted a witness against her husband, because the tie of allegiance is more obligatory than any other. Secondly, by the 5 Geo. II. the wife of a bankrupt may be examined by the commissioners touching his estate, but not his bankruptcy. Thirdly, if a woman be taken away by force and married, she may be an evidence against her husband indicted on 3 Hen. VII. c. 2. against the stealing of women: For a contract obtained by force has no obligation in law. So upon an indictment on 1 Ja. I. c. 11. for marrying a second wife, the first being alive, though the first

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cannot

• Law of Nisi Prius, 283, 284.

cannot be a witness yet the second may, the second marriage being void. And whether a wife *de jure*, [a lawful wife] may not be a witness against her husband on an indictment for a personal tort done to her, seems to be matter of doubt. In lord Audley's case she was allowed to be a witness to prove her husband assisted to a rape upon her; and though this case has been denied to be law, yet it was in cases where the indictment was not for a personal tort to the wife; and in the case of Azyre, on an indictment for the battery of the wife, lord Raymond suffered the wife to give evidence; and the wife is always permitted to swear the peace against her husband; and her affidavit has been admitted to be read, on an application to the court of King's Bench, for an information against the husband, for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution upon, and not afterwards to be a witness at the trial. Fourthly, in an action between other parties, the wife may be a witness to charge her husband, *ex gr.* [for example] to prove the goods, for which the action is brought, sold on the credit of the husband.—So perhaps in some cases, in an action against her husband, though she will not be admitted to be a witness, yet a confession of her's may be given in evidence to charge him. As where an action was brought for nursing his child, the plaintiff was allowed to give in evidence, that the wife declared the agreement to have been for so much *per week*, because such matters are usually transacted by the women^d.

A WIFE shall not be called in any case to give evidence even *tending* to criminate her husband. In a case of settlement where a marriage in fact had been proved between two paupers, it was held the first wife of the husband was not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy^e. And in a very late case it is held that, husbands and wives cannot in any case be witnesses either for or against each other. As, where an action was by the executrix of a surviving trustee under a marriage settlement of J. Lewis in 1780, by which certain household goods, mentioned in a schedule annexed to the deed, were settled to the sole and separate use of Lewis's wife; and it was brought against the defendant, sheriff of Monmouthshire, to recover back the value of some of those articles, which had been seized and

^d Law of Nisi Prius, 286, 287.

^e *Rex v. Cliviger*, Hil. 28 Geo. III.

² Durnf. & East, Rep. 262.

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and sold by him under an execution against Lewis. At the trial at Monmouth before Grose, J. J. Lewis was called as a witness to prove the identity of the goods: the defendant's counsel objected to his competency, and it was said that he was interested, to which it was answered that he came to speak against his interest; for that if these goods, which had been seized, were not his own and could not be taken to pay his debt, he would be liable afterwards. Whereas, if they could be taken in execution, his debt would be discharged. The learned judge admitted the witness but reserved the point. And a rule being obtained to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had. In shewing cause it was argued that, the husband was a competent witness in this case, because he was not interested. That the rule with regard to admitting husbands, or wives, as witnesses, is accurately laid down in the Law of Nisi Prius, [above cited] where it is said, "that husband and wife cannot be admitted to be witnesses *for* each other, because their interest are absolutely the same; nor *against* each other, because contrary to the legal policy of marriage." And this rule appears to be warranted by the cases; *Broughton v. Harpur*, 2 Ld. Raym. 752; and *Bentley v. Cook*, cited in *R. v. Cliviger*, [above cited] went on the ground of interest; and 1 *Brownl.* 47; and *R. v. Cliviger*, on the policy of marriage. Then the only ground, on which husbands and wives are rejected, when speaking *for* each other, is that of interest; but here the interest was the other way.

LORD KENYON, chief justice. Independently of the question of interest, husbands and wives are not admitted as witnesses either for or against each other: from their being so nearly connected, they are supposed to have such a bias upon their minds that they are not to be permitted to give evidence either for or against each other.—Buller, J. It is now considered as a settled principle of law, that husbands and wives cannot in any case be admitted as witnesses either for or against each other.—Rule absolute¹.

No other relation is excluded being a witness, because no other relation is absolutely the same in interest: Therefore in *Pendrel and Pendrel*; before lord Raymond, which was an issue out of chancery to try whether the plaintiff were heir to J. O. the marriage and birth being admitted by order, the mother was admitted to prove the father had access to her. So in *Lomax and Lomax* before lord Hardwicke, the mother was admitted to prove the marriage; and in an ejectment against Sarah Brodie at Hertford, 1744. Mr. J. Wright ad-

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¹ *Davis v. Dinwoody*, Easter, 32 Geo. III. 4 Durnf. & East. Rep. 678.

mitted the father to prove the daughter legitimate ; her title being as heir to her mother ^s.

2. THE exceptions to the rule that no person interested can be a witness, are various. In criminal prosecutions a party interested will be admitted in most instances ; divers whereof we shall hereafter attend to in paragraphs 3, 4 and here proceed to mention a few other instances of the exceptions to this rule ; as that a party interested will be admitted for the sake of trade and common usage of business. Therefore a porter shall be evidence to prove a delivery of goods. So a banker's apprentice to prove the receipt of money. So an indorsement on a bond, by the obligee of the receipt of interest, has been admitted to bring it within the twenty years.

ANOTHER exception to this rule is, that a party interested will be admitted where no other evidence is reasonably to be expected ; as upon the statute of Hue and Cry, where the party robbed is admitted, even though himself be plaintiff. So where the question was, whether the master had deserted the ship, (Suffex) without sufficient necessity ; a sailor who had given bond to the master, (as a trustee for the company, not to desert the ship during the voyage) was admitted evidence for the master, it appearing all the sailors entered into such bonds. So where a son having a general authority to receive money for his father, received a sum and gave it to the defendant ; the son was admitted a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money. So in trover against a pawnbroker, the servant embezzling his master's goods, and pawning them, will be admitted to prove the fact ^h.

THE strict notion of the objection to the competency of a witness is, what is termed a *voir dire*, as when it is prayed upon a trial at law, that a witness may be sworn upon a *voir dire* ; which is that he shall on his oath speak the truth, whether he shall get or lose by the matter in controversy ; and if it appears he is unconcerned, his testimony is allowed, otherwise not. In the case of *Turner and others v. Pearte*, Easter, 27 Geo. III. on a motion in the court of King's Bench for a new trial, it was held that an objection to the competency of witnesses discovered after a trial, is not sufficient ground of itself for granting a new trial ; and by justice Buller in delivering his opinion in this case : Anciently no doubt the rule was, that if there were any objection to the competency of the witness, he should be examined on the *voir dire* ; and it was too late after he was sworn in chief. In later times, that rule has been

^s Law of Nisi Prius, 286, 287.

^h *Ibid.* 288, 289.

been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court, and it is for the furtherance of justice. The examination of a witness, to discover whether he is interested or not, is frequently to the same effect as his examination in chief: So that it saves time, and is more convenient, to let him be sworn in chief in the first instance; and in case it should turn out that he is interested, it is then time enough to take the objection. But there never yet has been a case, in which the party has been permitted *after trial* to avail himself of any objections, which was not made at the time of the examinationⁱ.

3. In criminal prosecutions a party interested will be admitted in most instances, as we lately hinted, and that upon the statute of Hue and Cry, the party robbed is admitted, even though he be plaintiff himself. And where the defendant was indicted for tearing a note whereby he promised to pay so much money to A. B. who was produced as a witness, and notwithstanding he was going to swear to set up his own demand, because, if convicted, the court would compel the defendant to give a new note, yet he was admitted^k.—In the case of *Abrahams v. Bunn*, King's Bench, Trin. 3 Geo. III. the court held that the person who borrowed money on a pawn, was a good witness in an action for usury against the pawnbroker, though the payment of the money borrowed was proved by no other person but himself. For the judgment in this action could not be given in evidence in an action against him for money lent.—By lord Mansfield in delivering the opinion of the court in this case: Since the case of *Whiting*, [1 Salk. 283.] and the case of *Nunes*, there has been great light thrown upon the distinction between the interest, which affects the competency of a witness; and influence which goes only to his credit: There have been the arguments and judgment in the case of *Rex v. Bray*, mayor of Tintagel.—Then came the case of the *East-India Company v. Gosslen*. There was also a case of *Bailie v. Wilson* (about the proof of a will) before the delegates.—The solemn discussion of these three cases drew the line between interest, which goes to the competency; and influence which goes to the credit, more clearly than had before been understood.—It established a rule, “that where the matter “ was doubtful the objection should go to the credit.” It established

ⁱ 2 Durnf. & East, Rep. 717. ^k *Rex v. Moise*, Trin. 10 Geo. I. Str. 595.

established "that the question in a criminal prosecution being the same with a civil cause in which the witness was interested, went *generally* to the credit; unless the judgment in the prosecution where he was a witness could be given in evidence in the cause where he was interested." "I say *generally*," because all rules of evidence admit of exceptions¹.

It is said, a person whose hand is forged is not admitted to prove the forgery, yet under many circumstances he may, where he is not directly interested in the question; as in Well's case, who was indicted for forging a receipt from a mercer at Oxford, the mercer having before recovered the money in an action against Wells, was admitted to prove the forgery².

4. To repel the testimony of a witness on the ground of interest, the interest must be direct and immediate; as demonstrated in Newland's case, at the Old-Bailey in February Session 1784, where Abraham Newland was indicted for forging a bank note, signed "William Lander, *For the Governor and Company of the Bank of England.*" Mr. Lander was a cashier of the Bank of England, properly authorised by the directors to subscribe bank-notes with his own name for the governor and company; and had given security to them for the faithful performance of this duty. — The question was, Whether Mr. Lander was a competent witness to prove, that the bank-note charged to be forged was not a *genuine* bank-note, and that the name "William Lander" subscribed thereto was not his hand-writing?

By the court. This case is perfectly clear. Mr. Lander does not make himself personally responsible, by signing bank-notes in his own name "for the Governor and Company of the Bank of England;" and the law will not permit so forced and violent presumption to be raised, as that a man is guilty of a crime, in order to lay a platform on which to raise an objection to his competency on the ground of interest. To repel the evidence of a witness who comes to prove the forgery of his own hand-writing, it must appear that he would be liable to be sued in case it was genuine. The interest must be apparent on the face of the instrument itself, or arise immediately from the nature of the transaction, or from his own acknowledgement; for if a witness admits himself to have an interest, whether he has in fact an interest or not; yet the belief of it has an equal operation on his mind; and in either of these cases, it would be an objection to his testimony. In the present case, unless criminality be presumed, interest cannot be inferred; and such a presumption is certainly repugnant to the first principles

¹ 4 Burr. Rep. 2251.

² Law of Nisi Prius, 289.

ciples of law.—Mr. Lander's evidence was accordingly received, but the prisoner was acquitted^b.

AFTER the riots in the year 1780, a reward was offered by government for the apprehension and conviction of any of the rioters; and a question arose, whether persons thus interested in the conviction of the criminals were admissible witnesses against them? It was submitted to the consideration of the *Twelve Judges*; and they unanimously agreed, That the testimony of witnesses, who were entitled to and claimed the reward was admissible, notwithstanding that interest; and they mentioned the case of robbery, &c. where not only restitution of the stolen goods, but the title to the parliamentary reward, depended on the conviction of the offenders; and the case of witnesses entitled to rewards from the Bank, Post-Offices, and other public places; and yet those rewards had never been considered as giving such an interest as would destroy the competency of the witness^c.

5. THAT by a release, the person who was interested may be admitted a witness, we shall shew hereafter in § VI. par. 3. and here proceed to mention that in the case of *Carter v. Pearce*, Easter 26 Geo. III. it was said by Mr. Justice Buller that, in order to shew a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause either one way or the other^d. And in the case of *Walton and others assignees of Sutton v. Shelley*, Trinity, 26 Geo. III. (which case will be at large in our next ensuing section). By justice Buller in his discussion of this case: As to the question of *interest* it is much to be lamented that there is such confusion in the cases. I have always been of opinion, that the best rule to go by was to consider whether the witness was to derive any advantage from the event of the cause: but many cases tend strongly to contradict that idea. The material thing to be considered is, whether there is any distinction between the interest which the witness may have in the *issue of the cause*, and the *question* to be put to him. I am strongly inclined to think, that the most solid ground is to confine the objection to an interest in the event of the cause: but in doing that we must overturn many cases; whereof particular mention will be made in the ensuing section^e.

§ VI. 1. THAT a person is not a competent witness to impeach a security which he has given, although he is not interested in the event of the suit, was held in the before-mentioned

^b Leach, 287.

^c *Ibid.* 290.

^d 1 Durnf. & East, Rep. 163.

^e *Ibid.* 296.

tioned case of *Walton v. Shelley*, Trin. 26 Geo. III. wherein are discussed a variety of points relative to the incompetency of witnesses as persons interested, and divers late resolutions of the courts hereon thoroughly considered. And in a later case which will be attended to hereafter in par. 2. a distinction is taken between negotiable instruments and others; and shewn that it is not allowed as a general proposition, that a person who has signed an instrument cannot be permitted to give evidence to invalidate it, and that it must be confined to negotiable instruments.

UPON a motion to set aside the verdict, and grant a new trial in the cause of *Walton v. Shelley*, which was tried before Mr. Justice Buller at Guildhall, at the sitting after the last term, it was reported by him as follows:

THAT this was an action upon a bond given by the defendant to Sutton, to which there was a plea of *non est factum*, and another of the statute of usury. It was proved by one witness for the defendant, that the bond was given in consideration of delivering up two promissory notes made by Mrs. Perry, payable to Birch or order, the one indorsed by Birch and Davenport Sedley, the other by Birch, Corbin, and Davenport Sedley, to Sutton. Davenport Sedley was then called by the defendant to prove that the consideration for the notes was usurious. But his evidence was objected to on two grounds; 1st, That he was called to invalidate a security which he had given; and that an indorser of a note, independent of any question of interest, could not be permitted to prove a note void, which he himself had indorsed: 2dly, That he was interested in the question which was meant to be put to him; for if the notes were given for a usurious consideration, he would never be liable to pay them; though by overturning the bond, they may be set up again. For these reasons the witness was rejected, as being incompetent.

THE motion to set aside the verdict, was made upon the ground that Davenport Sedley was a competent witness, and ought to have been admitted to prove the fact of the usury.

MINGAY, Baldwin, and Manley shewed cause, and argued upon two questions which had been made; 1st, Whether the witness was not interested in the question? 2dly, Whether in any case a person shall be permitted to invalidate his own security? In arguing upon the first question, was instanced the principle upon which many persons are incapacitated from giving evidence, who are entirely uninterested in the event of the *cause*; yet being interested in the question which is put to them are therefore inadmissible, as in the case of commoners and underwriters.—

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On the second question it was argued that the courts have frequently laid it down as an invariable maxim, that no man shall be suffered to invalidate his own instrument; and if it were otherwise, the consequences would be very prejudicial to trade. In the case of *Abrahams and Bunn*, [in § v. par. 3.] where the borrower of money was called to prove an usurious contract entered into by the defendant, who was a pawn-broker, though the competency of the witness was allowed because the pledge was returned, yet lord Mansfield said, "had the defendant produced a security, or proved the pledge to have been remaining in his custody, it would have been a different consideration, whether the witness who was the borrower of the money, could be examined to contradict this."—In an action by the payee of a bill of exchange against the drawer, the acceptor, who was insolvent, was not permitted to give evidence. *Mitchel v. Conaway*, [12. Vin. Abr. tit. Evidence].

—In the case of *Winlaw and Daniel* [Sittings after Hil. 1786, at Westminster], which was an action of trover for three bills of exchange, lord Mansfield merely said, that an indorser might be a witness to prove the property of the notes in A. or B. as he was equally responsible to either. In such cases the testimony of the indorser does not go to invalidate his own security, and therefore he is admissible. But where such testimony goes in discharge of the note, he is not a competent witness. As in the case of *Whittenbury and others v. Jackson et ux.* [and wife] executrix [Sittings after Easter 1786, at Guildhall], which was an action on a promissory note given by Wheeler the testator in his life-time to one John Collier, and by him indorsed to the plaintiffs, for which he was made debtor in their books to nearly the amount of the note. The defendant proposed calling Collier to prove that the note had been satisfied by his having given two bills to the plaintiffs in discharge of it. The plaintiffs on the other hand contended, that the bills had been refused by them in discharge of the note. Buller, justice, refused to admit him upon two grounds, 1st, That he was interested in proving the note paid, for he thereby got rid of it: and as to his being liable for the book debt, that was a different transaction. 2dly. That he was called to invalidate his own security; for though his evidence did not tend to impeach the validity of the note, yet it tended to take away the remedy upon it by shewing it discharged.

It was not till after lord chief justice Lee's time, that the party who was interested in a note could give evidence concerning it in a criminal prosecution for forgery, perjury, or usury, where the note was the foundation of it. 2 Stra. 1043. 1104. 1229.

BEARCROFT and Bower, counsel on the other side, having closed their arguments, the court delivered their separate opinions.

LORD MANSFIELD, chief justice: The old cases upon the competency of witnesses, have gone upon very subtle grounds. But of late years the courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than to the competency of a witness. In this case it seems to me that the witness had no interest in the present question, for either way he is discharged. If the bond is good, it puts an end to the notes; if bad, the same ground that vacates the bond, vacates the notes; therefore, in point of interest, I think there is no objection to his competency. But what strikes me is the rule of law founded on public policy, which I take to be this; that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colours to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. It is emphatically right in the case of notes; for in consequence of different statutes, two very hard cases have arisen. First, with respect to a gaming note, which though in the possession of a *bona fide* purchaser, without notice, is void [as mentioned in C. VII. § 11. par. 1]. It is similar in the case of usury: A note given for an usurious consideration, though in the hands of a fair indorsee, is equally void [as shewn in C. VII. § 11. par. 3]. And therefore, whenever a man signs these instruments, he is always understood to say, that, to his knowledge, there is no legal objection whatever to them. The civil law says *nemo alligans suam turpitudinem est audiendus* [no man binding his own filthiness is to be heard]: Now apply this general maxim to the present case, with the distinction which has been taken. It has been argued at the bar, that this rule only holds where the action is brought upon the notes themselves, and therefore not relevant to this case. But I take the cases to be exactly the same. For the question on the validity of the bond involves in it the validity of the notes. The obligee of this bond trusted to the notes; he gave them up as a consideration for the bond; he trusted to the name of the indorser, and that *he* knew of no objection to the notes; and yet this same person was afterwards called to say that they were given for an usurious and illegal consideration; therefore, on that ground, I am of opinion that he was an incompetent witness.

JUSTICE

JUSTICE WILLES: As to the incompetency of Sedley's evidence on the ground of interest, I am clear that he had none, or rather that he came to give evidence contrary to his interest; because by destroying the bond he sets up the notes. But the general rule is, that no man shall be permitted to invalidate, by his own testimony, an instrument to which he is a party; and there has been no case cited in which this rule has been impeached. There has indeed been an instance, where a man was suffered to explain his own deed. That was a case before me at the last assizes at Lancaster. Two brothers joined in an assignment of a ship: and the question was, whether one of them had any interest in the vessel at the time of assignment. He was called to prove that he had none. His evidence was objected to, on the ground that he ought not to be permitted to contradict his own deed; but I was of opinion that he was a competent witness, because he came to swear against his own interest, that he had no property whatever in the vessel, and he explained it in this manner; that the person, to whom the assignment was made, thought that this witness had an interest in the vessel, and would not accept the assignment unless he was joined in it: and the court of Common Pleas refused an application last term to set aside the verdict, and agreed with my direction.—It is better in general that objections of this kind should go to the credit, than to the competency of the witness. But the present question falls within the general rule, that no man shall be permitted to alledge his own turpitude in having given credit to a false and illegal security.

JUSTICE ASHHURST: The general rule is, that where a man is not interested in the event, he shall be a competent witness, though he may have a bias upon his mind with regard to the subject matter. As if a person bring two several actions against two defendants for the same battery; in the action against one the other may be a witness, because he is not interested in the event. Any objections to such testimony should go to the credit rather than to the competency of the witness: therefore, if the present objection had rested solely on the question of interest, I should have been of opinion that Sedley was a good witness. But he is inadmissible on another ground, that no man shall be permitted to invalidate his own act; and here he has been a party to the fraud by affixing his name to the notes, and giving them a sanction; and having done that, he shall not be admitted upon any account to say that those notes were void.

JUSTICE

JUSTICE BULLER: Two grounds of objection have been taken. The first steers clear of interest in the event of the cause; and I have always understood it to be a settled principle, that no man shall be permitted to invalidate his own act. A distinction has been attempted to be made between the present case, and an action on the notes themselves; but there is no foundation for such a distinction. For, if an action be brought on a note against the drawer, an indorser cannot be called as a witness for him, though he is not interested in that cause; and if a verdict be given against the drawer, and satisfaction obtained from him, the indorser is discharged. In that case it is his interest to charge the drawer, therefore there is no difference between an action upon the notes against the drawer, and the present action upon the bond. But the ground of objection has always been, that no man shall invalidate his own security.

As to the question of interest, it is much to be lamented that there is such confusion in the cases. I have always been of opinion, that the best rule to go by was to consider whether the witness was to derive any advantage from the event of the cause: but many cases tend strongly to contradict that idea. The material thing to be considered is, whether there is any distinction between the interest which the witness may have in the issue of the cause, and the question to be put to him. I am strongly inclined to think that the most solid ground is to confine the objection to an interest in the event of the cause: but in doing that we must overturn many cases. As in the case of commoners; if the issue be on a right of common, which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends upon a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right: therefore there is a good reason for not receiving his testimony in such case. But the same reason does not hold where common is claimed by prescription in right of a particular estate; because it does not follow, if A. has a prescriptive right of common belonging to his estate, that B. who has another estate in the same manor, must have the same right; neither would the judgment for A. be evidence for B. and yet there are cases, which lay it down as a general rule, that one commoner is in no case a witness for another.

THEN in the case of policies of insurance, it has been held, that one under-writer cannot be a witness for another. *Ridout and Johnson*, East. 11 Ann. And the *East-India Company* and

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and *Gosling*, Mich. 16 Geo. II. before Lee, chief justice, [Law of Nisi Prius, 283.]

IN these cases, if the evidence offered tends to invalidate and destroy the instrument itself, that may be a reason for rejecting such testimony; but where such evidence is offered for any other purpose, there does not seem to be any good reason why it should not be received; for that verdict could not be given in evidence in another action upon the same policy against the witness or another under-writer. The cases on this subject, which have staggered me most, are two later ones in this court, by the names of *French v. Backhouse* and *French v. Foulston*, E. 11 Geo. III. [5 Burr. Rep. 2727.] Those were two distinct actions of covenant brought against two part owners of a ship by the husband of her, who had been appointed to that office by a deed executed by all the joint owners, by which deed they empowered him generally to advance or lend money, &c. The husband of the ship insured for all the owners, and brought separate actions against two of them. They were each of them charged for the amount of the whole sum paid. It was there agreed, that the direction to insure given by one part-owner, did not bind the rest. And in the first action against Backhouse, Mr. Dunning offered to call the other part-owner, and insisted that he was a competent witness, because he was not interested in the event of that suit; for that each of the two causes was to stand on its own evidence: but he was rejected by lord Mansfield, as an incompetent witness; and the court, upon motion for a new trial, were afterwards of that opinion. There the second defendant was certainly not interested to support the defence in the first cause; for if the plaintiff had recovered in that, the second defendant who was offered as the witness could not have been charged with any part of the damages recovered in the first action.

THEREFORE, if there is any difference between an interest in the question, and an interest in the event of the cause, and an interest in the question disables a witness, I think these cases prove that this witness was incompetent; for the question put to him was upon the validity of the notes. How or in what manner such evidence was to bear upon the case was material for further consideration, and further evidence in the progress of it; and the witness could not tell how the cause would turn out, or what effect his testimony might produce.—
Rule discharged^a.

2. THAT no party who has signed a paper or deed shall be permitted to give testimony to invalidate it, must be confined to negotiable instruments, was held in the case of *Bent v. Baker*

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So the supposed obligor of a forged bond, on being released by the obligee, is a competent witness to prove the forgery; as in Doctor Dodd's case. At the Old Bailey in February Sessions 1777, William Dodd, Doctor of Laws, was indicted on the statute of 2 Geo. II. c. 25. for forging a certain paper writing, purporting to be a bond in the penal sum of 8400l. and to be signed by the Earl of *Chesterfield* with the name of "*Chesterfield*," and to be sealed and delivered by the said Earl: And also, for forging a certain paper writing purporting to be an acquittance and receipt for money (*to wit*) 4200l. and to be signed by the said *Earl of Chesterfield* with the name "*Chesterfield*."—The indictment consisted of eight counts, charging the prisoner with having knowingly uttered and published as true the said paper writing; and laying the offence to have been committed with an intention to defraud, *first*, the *Earl of Chesterfield*, and *secondly*, Mr. *Henry Fletcher*.—The *Earl of Chesterfield* was produced as a witness on the trial, to prove that the name "*Chesterfield*" was not his signature; and on producing a release from Mr. *Henry Fletcher*, the supposed obligee of the bond, he was admitted to give his evidence^d.

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